Supreme Court, U.S.
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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

SHOSHONE INDIAN TRIBE OF THE WIND RIVER RESERVATION AND THE ARAPAHO INDIAN TRIBE OF THE WIND RIVER RESERVATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether provisions contained in appropriations Acts for the Department of Interior since 1990 have the effect of reviving claims that (a) had already expired under the applicable statute of limitations before the passage of the first such appropriations law, or (b) alleged a failure by the government to bring revenues into the relevant tribal trust accounts.

2. Whether the respondent Tribes can recover prejudgment interest on funds that the United States ought to have collected on their behalf but that were not deposited into tribal trust accounts.

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PETITION FOR A WRIT OF CERTIORARI

The Acting Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-32a) is reported at 364 F.3d 1339. The opinion of the Court of Federal Claims (CFC) addressing the statute of limitations issue (App. 33a-54a) is reported at 51 Fed. Cl. 60. The opinion of the CFC addressing the prejudgment interest issue (App. 55a-60a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 2004. Petitions for rehearing were denied on August 26, 2004 (App. 72a-75a). On November 12, 2004, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 24, 2004. On

December 14, 2004, the Chief Justice further extended the time to file to and including January 7, 2005. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 2501 of Title 28, United States Code, provides in pertinent part that "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. 2501.

2. Section 2516(a) of Title 28, United States Code, provides: "Interest on a claim against the United States shall be allowed in a judgment of the United States Court of Federal Claims only under a contract or Act of Congress expressly providing for payment thereof." 28 U.S.C. 2516(a).

3. Every Department of Interior (DOI) appropriations law since 1990 has contained a provision substantially similar to the following:

> That notwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim, including any claim in litigation pending on the date of the enactment of this Act, concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss.

Act of Nov. 10, 2003, Pub. L. No. 108-108, Tit. I, 117 Stat. 1263.[1]

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[1] See Act of Nov. 5, 1990, Pub. L. No. 101-512, Tit. I, 104 Stat. 1930; Act of Nov. 13, 1991, Pub. L. No. 102-154, Tit. I, 105 Stat. 1004; Act of Oct. 5, 1992, Pub. L. No. 102-381, Tit. I, 106 Stat. 1389; Act of Nov. 11, 1993, Pub. L. No. 103-138, Tit. I, 107 Stat. 1391; Act of Sept. 30, 1994, Pub. L. No. 103-332, Tit. I, 108 Stat. 2511; Act of Apr. 26, 1996, Pub. L. No. 104-134, Tit. I, 110 Stat. 1321-175; Act of Sept. 30, 1996, Pub. L. No. 104-208, Tit. I, 110 Stat. 3009-197 to 3009-198; Act of Nov. 14, 1997, Pub. L. No. 105-

4. Section 612 of Title 25, United States Code, provides as follows:

> The Secretary of the Treasury, upon request of the Secretary of the Interior, is authorized and directed to establish a trust fund account for each tribe and shall make such transfer of funds on the books of his department as may be necessary to effect the purpose of section 611 of this title: *Provided*, That interest shall accrue on the principal fund only, at the rate of 4 per centum per annum, and shall be credited to the interest trust fund accounts established by this section: *Provided further*, That all future revenues and receipts derived from the Wind River Reservation under any and all laws, and the proceeds from any judgment for money against the United States hereafter paid jointly to the Shoshone and Arapahoe Tribes of the Wind River Reservation, shall be divided in accordance with section 611 of this title and credited to the principal trust fund accounts established herein; and the proceeds from any judgment for money against the United States hereafter paid to either of the tribes singly shall be credited to the appropriate principal trust fund account.

25 U.S.C. 612.

STATEMENT

1. The Shoshone Indian Tribe of the Wind River Reservation and the Arapaho Indian Tribe of the Wind River Reservation (the Tribes), respondents in this Court, share an undivided interest in the Wind River Indian Reservation in Wyoming. App. 34a. That undivided interest includes min-

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83, Tit. I, 111 Stat. 1559; Act of Nov. 29, 1999, Pub. L. No. 106-113, App. C, Tit. I, 113 Stat. 1501A-153; Act of Oct. 11, 2000, Pub. L. No. 106-291, Tit. I, 114 Stat. 939; Act of Nov. 5, 2001, Pub. L. No. 107-63, Tit. I, 115 Stat. 435; Act of Feb. 20, 2003, Pub. L. No. 108-7, Div. F, Tit. I, 117 Stat. 236; Act of Nov. 10, 2003, Pub. L. No. 108-108, Tit. I, 117 Stat. 1263.

eral and other resources such as oil, gas, sand, and gravel located on the Reservation. See *id.* at 35a. On October 10, 1979, the Tribes filed separate complaints in the Court of Federal Claims (CFC), alleging that the United States had breached its trust responsibilities by (1) mismanaging the natural resources on the Reservation, thereby failing to generate adequate revenues for the Tribes; and (2) mishandling tribal funds after collection. See *id.* at 33a-34a. The Tribes sought damages for all such breaches of trust occurring since August 14, 1946. See C.A. App. 69, 82; App. 5a, 35a.

2. The separate actions filed by the two Tribes were consolidated by the CFC. The court divided the case into four "phases," the first of which involved the Tribes' claims relating to sand and gravel resources. App. 35a. The parties filed pretrial motions addressing legal issues that would affect the scope of the anticipated trial on those claims. This petition for a writ of certiorari concerns the resolution by the CFC, and subsequently by the court of appeals, of two such issues.

a. In a ruling issued November 30, 2001, the CFC addressed the impact of recent appropriations Acts (see p. 2 & note 1, *supra*) on the Tribes' ability to pursue their claims. App. 33a-54a. Those Acts have provided since 1990 that the applicable limitations period "shall not commence to run on any claim * * * concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds."[2] The CFC

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[2] The American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, 108 Stat. 4239, requires the Secretary of the Interior to "account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to section 162a of [Title 25]." 25 U.S.C. 4011(a); see *Cobell* v. *Norton*, 240 F.3d 1081, 1102-1104 (D.C. Cir. 2001). It is undisputed for present purposes that the respondent Tribes

identified two disputed issues concerning the proper interpretation of those Acts: "[1] whether the Acts preserve claims time-barred before the passage of the first of [the] Acts and, if so, [2] whether the Acts preserve only claims related to money already received by [the government] or also preserve claims for monies that should have been received by the trust but were not received because of mismanagement of the Tribes' resources." App. 38a.

The CFC resolved both those questions in the Tribes' favor. The court found that the appropriations Acts eliminated any potential barrier to the Tribes' claims, regardless of when those claims accrued, because the Tribes had not previously received an accounting. App. 47a-51a. The CFC also held that "the Acts cover claims both for monies received in trust by [the government] and thereafter mismanaged and to * * * monies that should have been received by the trust but were not received because of mismanagement of the Tribes' mineral and other assets." *Id.* at 51a.

b. In a subsequent order (App. 55a-60a), the CFC held that the Tribes would not be entitled to prejudgment interest on any funds that ought to have been deposited in tribal trust accounts but were not in fact deposited. See *id.* at 56a-58a. The court was "unpersuaded" that 25 U.S.C. 612, which establishes trust accounts in the Treasury for the respondent Tribes and provides for the payment of interest at the rate of 4% on amounts deposited in those accounts, "provides the necessary 'hook' which would remove this case from the general prohibition against awarding prejudgment interest against the United States." App. 57a. The court noted that Section 612 "specifically refers to the accrual of interest on

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have not yet received an "accounting," within the meaning of the relevant appropriations Acts, with respect to the sand and gravel revenues at issue in this appeal.

'proceeds from any judgment,' thus expressly contemplating postjudgment interest but not prejudgment interest." *Ibid.*

The CFC further concluded that this Court's decision in *Peoria Tribe of Indians* v. *United States*, 390 U.S. 468 (1968), did not support the Tribes' claim to prejudgment interest. App. 57a-58a. The court found that, "[i]n contrast to the legislation involved in *Peoria*, Section 612 focuses on the entitlement to interest *after* receipt of money." *Id.* at 57a. The CFC explained that "Section 612 does not state, as the legislation involved in *Peoria* [did], that the United States shall sell land and then invest, nor does it appear to impose such a responsibility by any similar phrasing." *Id.* at 58a.

3. After the CFC entered those orders, the parties entered into a settlement of the sand and gravel claims. See App. 65a-71a. Under the terms of the settlement agreement, the United States agreed to pay the Tribes a total of $2.75 million, and the parties reserved their rights to appeal the rulings described above. See *id.* at 68a-69a. The United States further agreed to pay the Tribes an additional $50,000 if the statute of limitations issue is finally resolved in the Tribes' favor, and to pay the Tribes an additional $500,000 if the Tribes prevail on their appeal of the CFC's prejudgment interest ruling. *Id.* at 69a. The CFC approved the settlement and entered judgment on the Tribes' sand and gravel claims. *Id.* at 61a-64a.

4. The Court of Appeals for the Federal Circuit affirmed in part, reversed in part, and remanded. App. 1a-32a.

a. The court of appeals held that the relevant appropriations Acts categorically eliminate any statute-of-limitations barrier to the Tribes' assertion of claims falling within the Acts' coverage. The court placed primary reliance on the phrases "[n]otwithstanding any other provision of law" and "shall not commence to run," which have appeared in each of the appropriations Acts. App. 12a. The court found that "[t]he introductory phrase '[n]otwithstanding any other pro-

vision of law' connotes a legislative intent to displace any other provision of law that is contrary to the Act, including 28 U.S.C. § 2501." *Ibid.* The court then stated that "[t]he next important phrase of the Act, 'shall not commence to run,' unambiguously delays the commencement of the limitations period until an accounting has been completed that reveals whether a loss has been suffered." *Ibid.* The court of appeals rejected the government's contention that the relevant appropriations Act language is a tolling provision that applies only to claims that remained live at the time that the first of the Acts was enacted or that accrued after that date. The court noted that "most statutes use the word 'toll' when the purpose of the statute is to interrupt the statute of limitations," and it construed Congress's failure to use the word "toll" in the appropriations laws to reflect a different intent. *Ibid.*

The court of appeals also concluded that its interpretation of the relevant appropriations laws would "comport[] with fundamental trust law principles." App. 14a. The court observed that "[b]eneficiaries of a trust are permitted to rely on the good faith and expertise of their trustees; because of this reliance, beneficiaries are under a lesser duty to discover malfeasance relating to their trust assets." *Ibid.* In recognition of that reliance interest, the court stated, it is "common for the statute of limitations to not commence to run against the beneficiaries until a final accounting has occurred that establishes the deficit of the trust." *Id.* at 15a (citations omitted).

With respect to the range of potential claims that the appropriations Acts would have the effect of preserving, the court of appeals adopted a position between those taken by the parties. See App. 16a-21a. Relying on this Court's interpretation of the Indian Mineral Leasing Act of 1938 (IMLA), ch. 198, 52 Stat. 347, 25 U.S.C. 396a *et seq.*, in *United States* v. *Navajo Nation*, 537 U.S. 488 (2003), the

court rejected the Tribes' contention that the appropriations Acts preserved claims based on the government's alleged failure to negotiate adequate prices for sand and gravel leases. App. 18a-19a. The court held, however, that *Navajo Nation* "does not foreclose liability for failing to manage or collect the *proceeds* from the approved mining contracts in violation of the trust responsibilities owed under the implementing regulations of the IMLA." *Id.* at 20a. The court concluded that the relevant appropriations laws "cover[] any claims that allege the Government mismanaged funds after they were collected, as well as any claims that allege the Government failed to timely collect amounts due and owing to the Tribes under its sand and gravel contracts." *Id.* at 21a.

b. The court of appeals also held that the Tribes were entitled to prejudgment interest on funds that should have been brought into the trust accounts in the Treasury but that were not collected, or that were collected in an unreasonably delayed fashion, as a result of the government's mismanagement. App. 21a-29a. The court stated that, "[b]ecause the Government was obligated under 25 U.S.C. § 612 to both credit the principal account with *all* future revenues and receipts and to accrue interest at the stated rate," Section 612 should be construed "to permit recovery for interest on revenues and receipts that the Government failed to collect or delayed in collecting under the Tribes' sand and gravel contracts." *Id.* at 23a. The court relied in part on this Court's decision in *Peoria Tribe*, which held that the government was required to pay interest on money that would have been brought into a tribal trust if the government had properly performed its treaty responsibilities in selling tribal land. *Id.* at 25a-26a.

c. Judge Rader dissented on the issue of prejudgment interest. App. 30a-32a. Judge Rader explained that, "[a]s a general proposition, 28 U.S.C. § 2516 relieves the United

States of any liability for prejudgment interest, except where Congress has expressly authorized that payment." *Id.* at 30a. Judge Rader would have held that 25 U.S.C. 612 does not provide clear authorization for a prejudgment interest award because Section 612 "makes the United States responsible only for interest on funds actually collected and deposited in the trust account" and "does not obligate interest on funds that the United States should have collected or should have deposited." App. 30a. Judge Rader found *Peoria Tribe* to be distinguishable because that case involved the breach by the United States of a "very specific" treaty obligation (the duty to sell tribal lands at public auction rather than by private sale), while the Tribes in this case have simply alleged "negligence in general administration of a trust." *Id.* at 32a.

REASONS FOR GRANTING THE PETITION

The Federal Circuit's decision in this case is seriously flawed. If allowed to stand, it will revive long-moribund claims and substantially increase the potential liability and litigation burdens of the United States associated with damages actions alleging mismanagement of Indian trust assets or accounts. Although the amounts of money that remain at issue in this petition are relatively modest, eight such lawsuits brought by Indian Tribes, alleging total damages of more than $3 billion, are already pending before the Court of Federal Claims.[3] Other Tribes are likely to file similar actions. Many additional suits could be generated by

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[3] See *Chippewa Cree Tribe of the Rocky Boy's Reservation* v. *United States*, No. 92-cv-00675; *Confederated Tribes of the Warm Springs Reservation of Or.* v. *United States*, No. 02-cv-00126; *Delaware Tribe of Indians* v. *United States*, No. 02-cv-00026; *Jicarilla Apache Nation* v. *United States*, No. 02-cv-00025; *Osage Nation* v. *United States*, No. 00-cv-00169; *Pueblo of Laguna* v. *United States*, No. 02-cv-00024; *Osage Nation* v. *United States*, No. 99-00550; and *Wolfchild* v. *United States*, No. 03-cv-2684.

the scores of thousands of individual Indians for whom the United States held funds in trust prior to 1984.[4]

Both the number and the potential dollar value of possible breach-of-trust claims against the United States are enormous. As a recent DOI report explained, in fiscal year 2003, DOI collected revenues from leasing, use permits, sales, and interest of approximately $195 million for 240,000 individual Indian money (IIM) accounts, and approximately $375 million for 1,400 tribal accounts. DOI also manages approximately $2.9 billion in tribal funds and $400 million in

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[4] The potential impact of the decision below is suggested by the number of suits that have been brought in district court by Tribes or individual Indians seeking an accounting of trust accounts. See *Cobell* v. *Norton*, No. 96-cv-1285 (D.D.C.); *Santee Sioux Tribe of Neb.* v. *Norton*, No. 03-cv-01602 (D.D.C.); *Shoshone-Bannock Tribes of Fort Hall Indian Reservation* v. *Norton*, No. 02-cv-00254 (D.D.C.); *Standing Rock Sioux Tribe* v. *Norton*, No. 02-cv-00040 (D.D.C.); *Three Affiliated Tribes of the Fort Berthold Reservation* v. *Norton*, No. 02-cv-00253 (D.D.C.); *Western Shoshone National Council* v. *United States*, No. 03-cv-02009 (D.D.C.); *Crow Tribe of Indians* v. *Norton*, No. 02-cv-00284 (D.D.C.); *Oglala Sioux Tribe* v. *Norton*, No. 04-cv-01126 (D.D.C.); *Omaha Tribe of Neb.* v. *Norton*, No. 04-cv-00901 (D.D.C.); *Osage Tribe of Indians of Okla.* v. *United States*, No. 04-cv-00283 (D.D.C.); *Chippewa Cree Tribe of the Rocky Boy's Reservation* v. *Norton*, No. 02-cv-00276 (D.D.C.) *Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation* v. *Norton*, No. 02-cv-00035 (D.D.C.); *Confederated Tribes of the Warm Springs Reservation of Or.* v. *Norton*, No. 02-cv-02040 (D.D.C.); *Crow Creek Sioux Tribe* v. *Norton*, No. 04-cv-00900 (D.D.C.); *Yankton Sioux Tribe* v. *Norton*, No. 03-cv-01603 (D.D.C.). Although those suits do not involve claims for monetary relief, the plaintiffs in those actions may seek in the future to recover damages in the CFC. In *Cobell* v. *Norton*, No. 96-cv-1285 (D.D.C.), the court of appeals held that the Department of the Interior had unreasonably delayed in the performance of its accounting of individual Indian trust accounts under the American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, 108 Stat. 4239, discussed at pp. 21-22, *infra*. See *Cobell* v. *Norton*, 240 F.3d 1081, 1104-1106 (D.C. Cir. 2001). The plaintiffs in that case are currently asking the district court to adjust account balances and are asserting an entitlement to accrued interest.

individual Indian funds. DOI, *Strengthening the Circle: Interior Indian Affairs Highlights 2001-2004*, at 10 (2004). And because the Federal Circuit has exclusive jurisdiction over appeals in cases involving damages claims against the United States, all such actions will be controlled by the Federal Circuit's rulings in this case.

If suits alleging breach of the government's trust obligations—in this case, for claims arising out of events dating back to 1946—may proceed without regard to the otherwise-applicable statute of limitations, both the potential dollar amounts of any recoveries that the plaintiffs may ultimately obtain, and the burden and expense of locating, assembling, and assessing the evidence necessary to resolve the claims of trust mismanagement, will be greatly increased. The availability of prejudgment interest on damages resulting from mismanagement of trust assets would likewise substantially increase the government's potential exposure in any given suit, and it would also increase the volume of trust litigation by inducing plaintiffs to sue even when their damages are small. Indeed, the court of appeals' ruling on prejudgment interest exacerbates the practical difficulties threatened by the court's construction of the appropriations Acts, since the availability of interest creates a particular incentive for plaintiffs to pursue claims that arose in the distant past. This Court's review is warranted to prevent those highly disruptive consequences.[5]

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[5] The Tribes have filed a petition for a writ of certiorari seeking review of the court of appeals' decision insofar as it holds that the appropriations Acts do not extend the statute of limitations for claims based on mismanagement of trust resources, except for alleged failures to collect payments under existing contacts, to deposit collected monies into interest-bearing accounts, or to assess penalties against lessees for late payments. See *Eastern Shoshone Tribe of the Wind River Reservation, et al.* v. *United States*, petition for cert. pending, No. 04-731 (filed Nov. 24, 2004).

I. THIS COURT SHOULD GRANT REVIEW OF THE COURT OF APPEALS' DECISION TO REVIVE MORIBUND CLAIMS, INCLUDING CLAIMS ALLEGING FAILURE TO COLLECT REVENUES FROM THE TRIBES' NATURAL RESOURCES

In two distinct respects, the court of appeals gave unduly broad effect to the recent appropriations Acts. First, the court's construction of the Acts would have the effect of reviving claims for which the applicable limitations period had already expired when the first of the Acts was passed. Second, the court interpreted the statutory phrase "losses to or mismanagement of trust funds" to encompass situations in which the government is alleged to have breached its obligations not by dissipating or otherwise "losing" money on deposit in a trust account, but by failing to bring money into the account in the first instance. Those holdings are erroneous.

A. As a general rule, any claim within the jurisdiction of the CFC "shall be barred unless the petition thereon is filed within six years after such claim first accrues." 28 U.S.C. 2501. Although the Tribes filed suit in this case on October 10, 1979, they sought damages not only for claims accruing on or after October 10, 1973, but for all breaches of trust that may have occurred since August 14, 1946. See p. 4, *supra*; 28 U.S.C. 1505 (CFC has jurisdiction over claims by Tribes against the United States "accruing after August 13, 1946"); App. 5a. Although some of those claims became time-barred as early as 1952, the court of appeals held that all claims "concerning losses to or mismanagement of trust funds" (as the court understood that phrase, see pp. 20-23, *infra*) could go forward, without regard to the length of time that had passed between the accrual of the claim and the filing of suit. The effect of the court's decision is to revive claims against the government that had long ago expired through lapse of time before the first of the appropriations Acts was passed

—even if the alleged breach of trust occurred as early as 1946, and even if the tribal plaintiff was or should have been aware of the nature of the alleged breach at the time that it occurred. Nothing in the text or history of the Acts suggests that Congress intended that extraordinary result.

1. Applicable canons of statutory interpretation make clear that the relevant appropriations laws could properly be construed to revive lapsed claims only if the language of the Acts unambiguously compels that result. As a general rule, "[s]ubsequent extensions of a limitations period will not revive barred claims in the absence of a clear expression of contrary legislative intent." *Resolution Trust Corp.* v. *Seale*, 13 F.3d 850, 853 (5th Cir. 1994). See *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 950 (1997) ("[E]xtending a statute of limitations after the pre-existing period of limitations has expired impermissibly revives a moribund cause of action."); *Chenault* v. *United States Postal Serv.*, 37 F.3d 535, 539 (9th Cir. 1994) ("[A] newly enacted statute that lengthens the applicable statute of limitations may not be applied retroactively to revive a plaintiff's claim that was otherwise barred under the old statutory scheme."), quoted in *Hughes Aircraft*, 520 U.S. at 950; *Village of Bellwood* v. *Dwivedi*, 895 F.2d 1521, 1527 (7th Cir. 1990) (new statute extending a limitations period "presumptively would not apply to a claim that became barred under the old law before the new one was enacted") (quoting *United States* v. *Kimberlin*, 776 F.2d 1344, 1347 (7th Cir. 1985), cert. denied, 476 U.S. 1142 (1986)). Cf. *Stogner* v. *California*, 539 U.S. 607 (2003) (statute that revives time-barred criminal cause of action violates Ex Post Facto Clause).[6]

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[6] As a constitutional matter, this Court's decisions recognize that a statute of limitations in a civil case "can be extended, without violating the Due Process Clause, after the cause of the action arose and even after the statute itself has expired." *Plaut* v. *Spendthrift Farm, Inc.*, 514 U.S. 211,

In the instant case, that rule of construction is reinforced by firmly established principles of sovereign immunity. "[T]he United States, as sovereign, is immune from suit save as it consents to be sued," *United States* v. *Testan*, 424 U.S. 392, 399 (1976) (citation and internal quotation marks omitted), and waivers of sovereign immunity "cannot be implied but must be unequivocally expressed," *United States* v. *King*, 395 U.S. 1, 4 (1969). When a plaintiff's right to sue the United States is made subject to a statute of limitations, "the limitations provision constitutes a condition on the waiver of sovereign immunity." *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983); see *United States* v. *Mottaz*, 476 U.S. 834, 841 (1986); cf. *Raygor* v. *Regents of Univ. of Minn.*, 534 U.S. 533, 543-544 (2002) (similar for suits against a State). Because "the Government's consent to be sued must be construed strictly in favor of the sovereign, and not enlarged beyond what the language requires," *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 34 (1992) (citations, brackets, ellipses, and internal quotation marks omitted), any ambiguity in the relevant appropriations Acts must be resolved in a manner that avoids subjecting the government to previously lapsed claims.

The relationship between Indian Tribes and the United States provides no basis for declining to apply the canons of construction described above. Even in cases involving Indian plaintiffs, statutory waivers of the government's sovereign immunity must be narrowly construed, and the court's jurisdiction must be limited to that which Congress clearly intended. See, *e.g.*, *Mottaz*, 476 U.S. at 851 ("[E]ven for Indian plaintiffs, a waiver of sovereign immunity cannot

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229 (1995); see, *e.g.*, *Chase Sec. Corp.* v. *Donaldson*, 325 U.S. 304, 315-316 (1945). The existence of congressional *power* to revive lapsed claims, however, does not vitiate the rule of construction that requires a clear statement of congressional intent to accomplish that result. Compare *Landgraf* v. *USI Film Products*, 511 U.S. 244, 267-268 (1994).

be lightly implied but must be unequivocally expressed.") (brackets and internal quotation marks omitted); *Klamath & Moadoc Tribes* v. *United States*, 296 U.S. 244, 250 (1935) ("The Act grants a special privilege to plaintiffs and is to be strictly construed and may not by implication be extended to cases not plainly within its terms."); *Blackfeather* v. *United States*, 190 U.S. 368, 376 (1903) ("As these statutes extend the jurisdiction of the Court of Claims and permit the Government to be sued for causes of action therein referred to, the grant of jurisdiction must be shown clearly to cover the case before us, and if it do[es] not, it will not be implied.").

2. The appropriations Acts do not provide the requisite clear statement of congressional intent to revive stale claims. In holding that the "plain language" of the Acts supported the Tribes' position, the court of appeals stated that "[t]he operative language of the Act[s] is the combination of the phrases '[n]otwithstanding any other provision of law' and the directive that the statute of limitations 'shall not commence to run' on any claim until an accounting is provided." App. 11a-12a. Those phrases do not support the Tribes' position.

The phrase "[n]otwithstanding any other provision of law" simply makes clear that, if a particular claim is timely under the terms of the appropriations Acts, no limitations period contained in another federal law can provide a basis for dismissal. For example, if a Tribe brings suit in the year 2000 to assert a claim of trust funds mismanagement that accrued in 1992, its action would be timely in part because of the "notwithstanding" language. That language would make clear that the appropriations Acts, which have been in effect since 1990 and would prevent the limitations period on a claim of that nature from "commenc[ing] to run," trump the general rule set forth in 28 U.S.C. 2501 that a claim in the CFC is barred unless suit is filed "within six years after such claim first accrues." But while the phrase "[n]otwithstand-

ing any other provision of law" makes clear that other statutes cannot limit the effect of the appropriations Acts, that phrase has no bearing on the question of *what* effect Congress intended the appropriations Acts to have.

The relevant inquiry thus centers on the statutory phrase "shall not commence to run"; and that language does not support the Tribes' position. Because the phrase addresses the question of when the limitations period *begins* to run, it has no logical application to limitations periods that not only had begun to run, but had *already expired*, before the first of the appropriations laws was enacted. Rather, the pertinent appropriations Act language is best construed as a tolling provision that preserves causes of action that were not yet time-barred as of the passage of the first appropriations provision (*i.e.*, claims that first accrued on or after November 5, 1984). See note 1, *supra*. The Acts prevent the statute of limitations from running during the specified period (*i.e.*, between the passage of the first of the Acts and DOI's provision of an accounting), but they do not purport to revive a moribund claim and *undo* the effect of a plaintiff's *prior* failure to assert its rights within the time specified by Congress in 28 U.S.C. 2501.[7]

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[7] Viewed in isolation, the phrase "shall not commence to run" suggests that the Acts' tolling effect is limited to claims that accrued after the enactment in 1990 of the first of the appropriations provisions. On that reading, a claim that accrued in (*e.g.*) 1988 would be unaffected by the Acts (because the limitations period on such a claim would have already "commence[d] to run"), and the time for filing suit would expire in 1994. Since 1993, however, the annual appropriations provisions have all been made applicable to "any claim in litigation pending on the date of" the enactment of the relevant appropriations law. See App. 7a n.2. That language suggests that the Acts' tolling effect extends to filed claims that were not time-barred when filed. No similar contextual evidence suggests, however, that the Acts are intended to revive claims that were already time-barred when the Acts were passed. And, while the government's reading of the appropriations Acts accords operative significance to the more

The court of appeals' reliance (App. 11a) on the supposed "plain language" of the appropriations Acts is flawed in another, related respect as well.[8] Emphasis on the fact that revived claims fall within the "plain terms" of a new limitations rule fails to give full effect to the requirement of a clear statement of legislative intent to revive moribund claims. Cf. *Hughes Aircraft*, 520 U.S. at 950. Decisions holding that new limitations periods are presumptively inapplicable to expired claims *typically* involve statutory amendments that, *if* applicable to the disputes before the courts, would treat the plaintiffs' claims as timely. See, *e.g.*, *Seale*, 13 F.3d at 851-853 (suit filed within the new period specified by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), Pub. L. No. 101-73, 103 Stat. 183, should be dismissed as untimely because the plaintiff's claims had expired under state limitations rules before FIRREA was enacted, and the FIRREA limitations period applies only to claims that remained live on FIRREA's effective date). The text of the relevant appropriations Acts thus provides no basis for rejecting the usual presumption that new limitations provisions will not be construed to revive lapsed claims, both because the phrase "shall not commence to run" has no obvious application to claims that have already expired, and because the Acts do not expressly provide for the revival of moribund claims.[9]

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recent statutes' references to pending litigation (since those references can serve to dispel the otherwise-permissible reading that the riders apply only to claims that accrued after the first rider was enacted), those statutory references would be wholly superfluous under respondents' construction of the Acts.

[8] Indeed, as noted, see n.7, *supra*, the "plain language" reading of the Acts would render them applicable only prospectively to claims on which the limitations period had not yet begun to run.

[9] In contrast to the court of appeals in this case, the district court in *Cobell* v. *Babbitt*, 30 F. Supp. 2d 24, 44 (D.D.C. 1998), held that the relevant appropriations provisions toll the statute of limitations for live claims

3. The court of appeals also believed that its construction of the appropriations Acts "comport[ed] with fundamental trust law principles." App. 14a. The court based that statement on its understanding that the statute of limitations on a breach-of-trust claim commonly begins to run only when "a final accounting has occurred that establishes the deficit of the trust." *Id.* at 15a. If the provision of an accounting were an invariable prerequisite to the commencement of the limitations period in breach-of-trust cases, the appropriations provisions at issue here would not have the effect of reviving lapsed claims, but would simply codify the common-law accrual rule. In fact, however, the court of appeals' analysis reflects a serious misunderstanding—or at least a substantial oversimplification—of background common-law principles governing the commencement of limitations periods on claims for breach of trust.

This Court has frequently found breach-of-trust claims to be time-barred, even in the absence of a formal accounting, when the conduct constituting the alleged breach had been known to the plaintiff long before suit was filed. See *Philippi* v. *Philippe*, 115 U.S. 151, 156-157 (1885); *Speidel* v. *Henrici*, 120 U.S. 377, 386 (1887); *Benedict* v. *City of New York*, 250 U.S. 321, 327 (1919). The Federal Circuit has held more generally that a breach-of-trust claim brought by a Tribe or individual Indian against the United States "first accrues" within the meaning of 28 U.S.C. 2501 "when all the events which fix the government's alleged liability have

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but do *not* revive claims that had previously expired. The court explained that, "[a]bsent some clear, contrary expression of congressional intent that would lead to the conclusion that Congress meant to revive stale claims, the plaintiffs' interpretation of the tolling language * * * must be rejected." *Id.* at 44 (citing *Seale*). The court found nothing in the text or history of the appropriations Acts that would suggest an intent to revive claims that had become time-barred before the first of the Acts was passed. *Ibid.*

occurred and the plaintiff was or should have been aware of their existence." *Hopland Band of Pomo Indians* v. *United States*, 855 F.2d 1573, 1577 (Fed. Cir. 1988); accord *Jones* v. *United States*, 801 F.2d 1334, 1335 (Fed. Cir. 1986) ("Generally, an action for breach of fiduciary duty accrues when the trust beneficiary knew or should have known of the breach."), cert. denied, 481 U.S. 1013 (1987); *Brown* v. *United States*, 195 F.3d 1334, 1337-1338 (Fed. Cir. 1999); *Menominee Tribe* v. *United States*, 726 F.2d 718, 721 (Fed. Cir.), cert. denied, 469 U.S. 826 (1984).

Cases could arise in which the beneficiary is not placed on notice of an alleged breach of trust, and the statute of limitations on his claim does not begin to run, until the trustee has provided an accounting that furnishes the beneficiary with sufficient information to constitute the requisite notice. In many circumstances, however, the statute of limitations will commence because the trust has terminated or the beneficiary has alternative means of acquiring actual or constructive knowledge of the trustee's allegedly wrongful conduct, even in the absence of an accounting. Thus, at least in a great number of the cases to which the Federal Circuit's reading of the appropriations Acts will apply, the effect of the court's decision will be to revive breach-of-trust claims that had previously accrued and expired under generally applicable limitations principles.[10]

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[10] The only case cited by the court of appeals in support of the proposition that an accounting is commonly required in order to trigger the limitations period in a breach-of-trust case was *McDonald* v. *First National Bank*, 968 F. Supp. 9, 14 (D. Mass. 1997). See App. 15a. The Federal Circuit's reliance on *McDonald* was misplaced. The district court in *McDonald* did not treat an accounting as an essential prerequisite to the accrual of a breach-of-trust cause of action, but simply held that the statute of limitations had not run in that case because the plaintiffs had not received "accountings *or other information* that would have alerted them to the trustees' alleged mismanagement of the trusts' assets." 968 F. Supp. at 14 (emphasis added).

B. The court of appeals compounded its error by giving an unduly broad reading to the phrase "losses to or mismanagement of trust funds." The court did not appear to dispute the government's contention (see App. 17a) that "mismanagement of trust funds" can occur only when the government mishandles money that has actually been taken into the trust. The court construed the phrase "losses to * * * trust funds," however, to encompass instances in which the United States wrongfully failed to collect and deposit money owed to the Tribes under existing mineral leases. See *id.* at 20a. That holding is inconsistent with the text and purposes of the relevant appropriations provisions.

1. Various provisions of Title 25 refer to tribal "trust funds" and require that "funds" held in trust for Tribes or individual Indians be deposited in specified accounts in the United States Treasury or invested in public debt securities. See, *e.g.*, 25 U.S.C. 161, 162a, 611, 612. Those provisions can be sensibly applied only if the term "funds" is understood, in accordance with its usual meaning, as limited to *monetary* assets. The term "funds" in the relevant appropriations Acts therefore cannot be construed to include the tribal sand and gravel resources that the government is alleged to have mismanaged.

2. The government's failure to collect and deposit monies owed under the Tribes' mineral leases is not properly regarded as a "loss[]" to the tribal trust accounts in the United States Treasury or the monies located in those accounts. In ordinary parlance, a "trust fund" can sustain a "loss" only with respect to money that is first contained in the fund and then is dissipated, not with respect to money that was never paid into the trust in the first place but that allegedly would have been obtained if income-generating activities had been conducted in a more productive or prudent fashion. And, to the extent that the term "losses" in the appropriations Acts is ambiguous, that ambiguity must be resolved in the gov-

ernment's favor in accordance with the interpretive principles set forth at pp. 14-15, *supra*.

3. Construing the phrase "losses to * * * trust funds" to encompass the government's failure to derive revenue from the natural resources of a Tribe or individual Indian would not further the purpose of the relevant appropriations provisions. The Acts by their terms delay the running of the statute of limitations "until the affected tribe or individual Indian has been furnished with an accounting *of such funds*." Deferral of the statute of limitations until an accounting has been provided makes sense, however, only with respect to the sorts of claims as to which the accounting is intended to furnish information bearing on the proper disposition of the suit—*i.e.*, claims challenging the management of the trust funds themselves.

This focus on the trust funds is reinforced by the American Indian Trust Fund Management Reform Act of 1994 which refers only to an accounting of *money* held in distinct trusts in the Treasury or otherwise deposited or invested in a manner specified by law, not an accounting of the land or minerals that are separately held in trust by the United States for Tribes or individual Indians. See 25 U.S.C. 4011(a) ("The Secretary shall account for the daily and annual balance of all funds held in trust by the United States for the benefit of an Indian tribe or an individual Indian which are deposited or invested pursuant to section 162a of [Title 25]."). A straightforward reading of that language requires an accounting only of the sums *actually* paid into the relevant trust accounts. See also *Cobell* v. *Norton*, 240 F.3d 1084, 1102-1104 (D.C. Cir. 2001). The government need not attempt to determine what additional monies the accounts *would have* received if *other* assets, separately held in trust by the United States, had been managed in a more

productive fashion.[11] Because the accounting was not intended to determine whether the Tribes should have realized greater revenues from tribal natural resources, the appropriations riders should not be construed to defer the adjudication of suits alleging wrongful failure to collect and deposit such revenues.

The final words of the appropriations provisions also reinforce the conclusion that the phrase "losses to * * * trust funds" refers only to dissipation of monies that were actually contained in trust accounts. The appropriations Acts delay the running of the statute of limitations "until the affected tribe or individual Indian has been furnished with an accounting *of such funds from which the beneficiary can determine whether there has been a loss*." Given the nature of the accountings contemplated by the appropriations Acts ("of such *funds*") and mandated by the 1994 Act, however, the only "loss" that the accounting could be expected to reveal is a dissipation of funds that at one time were in a

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[11] The district court in *Cobell* v. *Norton*, No. 96-cv-1285 (D.D.C.) took a significantly broader view of the obligations entailed in the accounting for individual Indians required by the 1994 Act than did the government, and the court enjoined the government to proceed in compliance with that understanding. See *Cobell* v. *Norton*, 283 F. Supp. 2d 66, 294 (D.D.C. 2003). Finding that the injunction would cost six to twelve billion dollars to implement, see H.R. Conf. Rep. No. 330, 108th Cong., 1st Sess. 117 (2003), Congress amended the governing law, in an appropriations provision that expired on December 31, 2004, to state that the government would not be required "to commence or continue historical accounting activities with respect to the Individual Indian Money Trust" during the period that provision remained in effect. See Act of Nov. 10, 2003, Pub. L. No. 108-108, Tit. I, 117 Stat. 1263. The court of appeals vacated the injunction, stating that it would address the merits of the district court's ruling if the district court determined to reinstate its order. See *Cobell* v. *Norton*, No. 03-5314, 2004 WL 2828059, at *3-*6 (D.C. Cir. Dec. 10, 2004).

tribal trust account. The word "losses" in the earlier clause of the same sentence should be construed in a like manner.[12]

II. THIS COURT SHOULD ALSO REVIEW THE COURT OF APPEALS' ERRONEOUS HOLDING ON PREJUDGMENT INTEREST

The court of appeals also erred in holding that the Tribes could recover prejudgment interest on funds that were never made part of the relevant trust accounts in the Treasury but that respondents allege the government would have obtained if it had properly managed the Tribes' sand and gravel resources. In resolving this issue, it is critical to recognize that (1) the funds held in trust in Treasury accounts, and (2) land and other natural resources held in trust by the United States, constitute separate assets that are held in legally distinct trusts subject to different statutory schemes. The statutes applicable to funds deposited in the Treasury, including those requiring the payment of interest on such funds, govern the former type of trust.

With respect to the latter type of trust, although the United States may sometimes hold land and its associated natural resources nominally in trust for a Tribe or individual Indian, a statute or treaty creating such a passive trust imposes no duty on the United States to manage the land and resources productively for the Tribe or individual

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[12] The House Report accompanying the 1993 appropriations Act states that the relevant provision "extends the Statute of Limitations with relation to Indian trust fund management, to protect the rights of tribes and individuals until the reconciliation and audit of their accounts has been completed." H.R. Rep. No. 158, 103d Cong., 1st Sess. 57 (1993). That description suggests a focus on claims as to which the statute of limitations had not yet expired (so that the limitations period could be "extend[ed]"), and on claims concerning management of "Indian trust fund[s]" (as distinct from Indian natural resources). The House Report thus supports the government's position with respect to both contested issues concerning the interpretation of the relevant appropriations Acts.

Indian, and therefore cannot give rise to a suit for damages under the Tucker Act or Indian Tucker Act. See *United States* v. *Mitchell*, 445 U.S. 535, 540-544 (1980); *Cobell* v. *Norton*, No. 03-5314, 2004 WL 2828059, at *8 (D.C. Cir. Dec. 10, 2004). Rather, a suit for damages against the United States will lie only for violations of a particular statute requiring the government to undertake specific duties with respect to Indian land or resources, and only if that statute can fairly be interpreted to mandate compensation for a violation. See *United States* v. *Navajo Nation*, 537 U.S. 488, 503, 506 (2003). And if a Tribe or individual Indian recovers damages based on the violation of such a statute, the Tribe or individual Indian could recover interest in connection with the damages award only if an Act of Congress *expressly* provides for the payment of prejudgment interest in connection with the mismanagement claim. Here, the respondent Tribes have pointed to no Act of Congress expressly providing for the payment of interest on amounts that allegedly should have been, but were not, collected and deposited from leases of Indian lands under the Indian Mineral Leasing Act.

A. Prejudgment interest is presumptively unavailable as an element of relief against the United States. That presumption rests both on general principles of sovereign immunity (see p. 14, *supra*), and on 28 U.S.C. 2516(a), which states that "[i]nterest on a claim against the United States shall be allowed in a judgment of the United States Court of Federal Claims only under a contract or Act of Congress expressly providing for payment thereof." This Court has made clear that Section 2516(a) imposes a substantial burden on a party seeking an award of prejudgment interest against the United States:

> [T]here can be no consent by implication or by use of ambiguous language. Nor can an intent on the part of the framers of a statute or contract to permit the recovery of interest suffice where the intent is not

> translated into affirmative statutory or contractual terms. The consent necessary to waive the traditional immunity must be express, and it must be strictly construed.

Library of Congress v. *Shaw*, 478 U.S. 310, 318 (1986) (citations and internal quotation marks omitted). Similarly, in *United States* v. *Thayer-West Point Hotel Co.*, 329 U.S. 585, 588-589 (1947), the Court stated that

> [i]t is not enough that the term [in a contract] might be construed to include the payment of interest. * * * That provision must be affirmative, clear-cut, unambiguous * * *. Likewise, where a statute is relied upon to overcome the force of [the predecessor of 28 U.S.C. 2516], the intention of Congress to permit the recovery of interest must be expressly set forth in the statute.

B. The court of appeals identified no law "expressly providing" (28 U.S.C. 2516(a)) for awards of prejudgment interest in suits alleging breach by the United States of a duty to collect revenues from Indian mineral leases. Rather, the court of appeals looked to a statute, 25 U.S.C. 612, that does not govern the management of Indian *lands*, but instead governs a distinct trust consisting of *funds* in an account held in the United States Treasury. Even then, the Federal Circuit acknowledged that 25 U.S.C. 612 "does not use the express term 'pre-judgment interest,'" but the court "interpret[ed] th[at] statute as providing a substantive basis for the award of interest as part of the Tribes' damages." App. 22a. Section 612's only references to "interest" of any sort, however, are contained in the directive that "interest shall accrue on the principal fund only, at the rate of 4 per centum per annum, and shall be credited to the interest trust fund accounts established by this section." 25 U.S.C. 612. The statutory mandate that interest be earned "on the principal fund"—the corpus of the distinct monetary trust account in

the Treasury—provides no basis for requiring the government to pay interest on hypothetical receipts that might have been generated if the Tribes' natural resources had been better managed, but that in fact were never collected and deposited into any tribal trust account.

The court of appeals "also f[ou]nd merit in the Tribes' argument that the general provisions for tribal trust management and interest accrual found in 25 U.S.C. §§ 161a, 161b, and 162a mandate the payment of interest." App. 26a. As with Section 612, however, those provisions by their terms require the accrual of interest on monies that are *actually deposited* in Indian trust accounts or actually derived from Indian irrigation projects.[13] None of the statutory provisions on which the court of appeals relied refers specifically to "prejudgment interest" or contains any suggestion that the United States may be compelled to pay interest on funds that *ought to have been* collected under a distinct obligation with respect to natural resources. Indeed, as Judge Rader explained in his dissent below (see App. 30a-

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[13] See 25 U.S.C. 161a(a) ("All funds held in trust by the United States and carried in principal accounts on the books of the United States Treasury to the credit of Indian tribes shall be invested" in interest-bearing public debt securities); 25 U.S.C. 161a(b) (same for funds held in trust for individual Indians); 25 U.S.C. 161b ("All tribal funds * * * included in the fund 'Indian Money, Proceeds of Labor', shall * * * be carried on the books of the Treasury Department in separate accounts for the respective tribes, and all such funds with account balances exceeding $500 shall bear simple interest at the rate of 4 per centum per annum."); 25 U.S.C. 162a(a) (authorizing Secretary of the Interior to withdraw tribal and individual Indian trust funds from the United States Treasury and to deposit those funds in interest-bearing bank accounts); 25 U.S.C. 162a(b) (authorizing Secretary of the Interior to invest "operation and maintenance collections from Indian irrigation projects and revenue collections from power operations on Indian irrigation projects" in interest-bearing bonds, notes, or other obligations); 25 U.S.C. 162a(c) (authorizing Secretary of the Interior, upon request by a Tribe or individual Indian, to invest that beneficiary's trust fund in public debt obligations or in mutual funds).

31a), the Federal Circuit's predecessor Court of Claims previously held in its en banc decision in *Mitchell II* that the Indian plaintiffs were not entitled to the payment of interest in connection with their damage claims for mismanagement of tribal resources. And in so holding, the Court of Claims specifically rejected the contention that 25 U.S.C. 161a, 161b, and 162a supported an award of interest. See *Mitchell* v. *United States*, 664 F.2d 265, 274-275 (1981), aff'd on other grounds, 463 U.S. 206 (1983).

C. In holding that the Tribes were entitled to prejudgment interest on funds that had never entered their trust accounts, the court of appeals relied substantially on this Court's decision in *Peoria Tribe*. See App. 25a-26a. In that case the Court construed a treaty between the United States and the Peoria Tribe that (a) required the government to sell a particular tract of land at public auction for the Tribe's benefit and (b) directed that any portion of the receipts not immediately paid to the Tribe "shall be invested in safe and profitable stocks, the interest to be annually paid to [the Tribe]." *Peoria Tribe*, 390 U.S. at 469 (quoting Treaty of May 30, 1854, Art. 7, 10 Stat. 1082). The United States sold the land at private sales rather than at public auction as the treaty required; and the Indian Claims Commission found that the government "received for the lands $172,726 less than it would have received if the sales had been made as required by the treaty." *Id.* at 470. This Court held that the United States was liable in damages not only for that amount, but also for the income that the $172,726 would have produced if that sum had been invested as the treaty required. *Id.* at 471-473. The instant case is distinguishable from *Peoria Tribe* in three crucial respects.

1. The court of appeals erred in concluding that the United States was subject to a legal duty, comparable to the treaty obligation to conduct public auction sales in *Peoria Tribe*, to collect funds owed the Tribes from the sale of their

natural resources. As this Court recognized in *Navajo Nation*, IMLA serves "to foster tribal self-determination by giving Indians a greater say in the use and disposition of the resources found on Indian lands." 537 U.S. at 494 (citation, brackets, and internal quotation marks omitted). That "greater say" includes the power to direct that lease payments will be made to the Indian mineral owner or to another designated recipient. See 25 C.F.R. 211.40 ("Unless otherwise specifically provided for in a lease, once production has been established, all payments shall be made to the MMS [Mineral Management Service] or such other party as may be designated."). Moreover, even where payments under a lease are to be made to MMS, Section 211.40 directs the lessee to make the payments, but it does not impose specific duties on MMS with respect to their collection. Absent a duty on the part of the government to collect payments owed on tribal mineral leases, the predicate for the interest award in *Peoria Tribe* is lacking in this case.[14]

2. In *Peoria Tribe*, the government's obligation to sell land at public auction and its duty to pay interest on the proceeds of the auction sale both arose from the same source of law—the treaty between the Peoria Tribe and the United States. See 390 U.S. at 469. In determining "the measure of

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[14] The court of appeals erred in suggesting (App. 22a-23a, 28a) that 25 U.S.C. 612 requires the government to collect lease payments on behalf of the respondent Tribes. Section 612 states "[t]hat all future revenues and receipts derived from the Wind River Reservation under any and all laws, * * * shall be * * * credited to the principal trust fund accounts established herein." 25 U.S.C. 612. Section 612 thus requires that all funds actually received by the United States Treasury must be credited to specified accounts, but it does not obligate the government to collect funds for the Tribes. The court of appeals also suggested that Interior Department "regulations in 30 C.F.R., Subchapters A and D" imposed such a duty on the United States. App. 20a. No such duty is mentioned in 30 C.F.R. Ch. II, Subch. A, which concerns the operations of the Mineral Management Service; and there is no Subchapter D within that Chapter.

damages for the treaty's violation in the light of the Government's obligations under that treaty," *id.* at 471, the Court treated those treaty provisions as part of a unified whole. In the instant case, by contrast, even if IMLA imposed a duty on the United States to collect lease payments for the Tribes' sand and gravel resources, nothing in that statute mandates the payment of interest on the money collected, or provides for the payment of prejudgment interest in connection with an award of money damages for a violation of that duty.

The court of appeals sought to fill that gap by relying on 25 U.S.C. 612. As explained above, however, that statute spells out the government's duties with respect to a legally distinct trust consisting of the accounts in the Treasury for the benefit of the Tribes, not with respect to the management of Indian lands and natural resources. And the only obligation with respect to the payment of interest imposed by 25 U.S.C. 612 and other statutes (25 U.S.C. 161a, 161b, and 162a) is the direction to the government to place the funds that are actually held in trust for Indians in interest-bearing accounts. For the foregoing reasons, an award of interest on funds that were not collected under a lease—and therefore were never deposited into the Treasury—would be *in addition to*, rather than a part of, the Tribes' damages for any breach of the government's alleged duty under the IMLA or its implementing regulations to collect revenues that may have been committed in this case.

3. In *Peoria Tribe*, this Court stated that, under applicable canons of construction, Indian treaties must "be construed, so far as possible, in the sense in which the Indians understood them, and in a spirit which generously recognizes the full obligation of this nation to protect the interests of a dependent people." 390 U.S. at 472-473 (internal quotation marks omitted); accord, *e.g.*, *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S.

658, 675 (1979). The instant case, by contrast, involves the interpretation not of a treaty but of federal *statutes*, which must be construed so as to give effect to the intent of Congress. See *United States* v. *First National Bank*, 234 U.S. 245, 259 (1914) (holding that Indian treaties must be interpreted to conform to the Indians' understanding of their terms, while statutes are not subject to the same canon of construction). There is consequently no countervailing rule of interpretation in this case that could justify an award of prejudgment interest against the United States in the absence of express statutory language authorizing that form of relief.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 2005

Supreme Court, U.S.
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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

SHOSHONE INDIAN TRIBE OF THE WIND RIVER RESERVATION AND THE ARAPAHO INDIAN TRIBE OF THE WIND RIVER RESERVATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FEDERAL CIRCUIT

Case Nos. 03-5036, 03-5037

THE SHOSHONE INDIAN TRIBE OF THE WIND RIVER RESERVATION, PLAINTIFF-CROSS APPELLANT

AND

THE ARAPAHO INDIAN TRIBE OF THE WIND RIVER RESERVATION, PLAINTIFF-CROSS APPELLANT

v.

UNITED STATES, DEFENDANT-APPELLANT

Decided: Apr. 7, 2004

Before RADER, Circuit Judge, ARCHER, Senior Circuit Judge, and GAJARSA, Circuit Judge.

Opinion for the court filed by Circuit Judge GAJARSA. Opinion dissenting-in-part filed by Circuit Judge RADER.

GAJARSA, Circuit Judge.

The United States government appeals from the decision by the Court of Federal Claims permitting the Shoshone and Arapaho Indian Tribes of the Wind River Reservation (the "Tribes") to bring allegedly untimely claims relating to the Government's management of sand and gravel resources on the reservation. *The Sho-*

shone Indian Tribe of the Wind River Reservation v. United States, No. 458a-79L, 459a-79L (Fed. Cl. Oct. 10, 2002) (order providing for final judgment on the issues of the statute of limitations and applicable interest) (the "*Shoshone Final Judgment Order*"); *see also The Shoshone Indian Tribe of the Wind River Reservation v. United States*, 51 Fed. Cl. 60 (2001). In addition, the Tribes submit a cross-appeal, arguing that the Court of Federal Claims erred in denying the Tribes interest on money that the Government should have, but did not, collect from the sale and leasing of sand and gravel deposits. *Shoshone Final Judgment Order*, at 1; *see also The Shoshone Indian Tribe of the Wind River Reservation v. United States*, No. 458a-79L, 459a-79L (Fed. Cl. June 21, 2002) (order denying interest to Tribes) (the "*Shoshone Interest Order*").

Because the Department of the Interior and Related Agencies Appropriations Act, Public Law No. 108-7, permits the Tribes to bring their trust management claims after they receive an accounting—regardless of when such claims accrued—this court affirms the Court of Federal Claims' decision on direct appeal. We limit, however, the claims that may be brought to those relating to (1) the Government's mismanagement of tribal trust funds after their collection and (2) losses to the trust resulting from the Government's failure to timely collect amounts due and owing to the Tribes under its sand and gravel contracts.

With respect to the Tribes' cross-appeal, we reverse the Court of Federal Claims' denial of interest and hold that the Tribes are entitled to interest on monies that the Government was contractually obligated to collect, but did not collect or delayed in collecting, on behalf of the Tribes.

We thus affirm-in-part, reverse-in-part, and remand the case for further proceedings.

I. BACKGROUND

A. *The Wind River Reservation*

The Eastern Shoshone Tribe (the "Shoshone") and the Northern Arapaho Tribe (the "Arapaho") share an undivided interest in the Wind River Indian Reservation (the "Wind River Reservation" or the "reservation") in Wyoming. *Shoshone Indian Tribe*, 51 Fed. Cl. at 61. The Shoshone originally occupied approximately 44,672,000 acres across Wyoming, Colorado, Idaho, and Utah. In 1868, the Shoshone signed a treaty with the United States (the "Treaty of 1868") and agreed to relinquish their aboriginal lands and relocate onto a reservation established for their benefit. In this treaty, the Government agreed that the reservation would be:

> set apart for the absolute and undisturbed use and occupation of the Shoshonee Indians herein named, . . . and henceforth *they will and do hereby relinquish all title, claims, or rights in and to any portion of the territory of the United States*, except such as is embraced within the limits aforesaid.

Treaty between the United States and the Eastern Band of Shoshonees and the Bannack Tribe of Indians, July 3, 1868, art. II, 15 Stat. 673 (emphasis added). By signing the Treaty of 1868, the Shoshone relinquished to the Government title to their aboriginal lands and reserved a right of occupancy and use to the Wind River Reservation. *Shoshone Tribe of Indians v. United States*, 299 U.S. 476, 496, 57 S. Ct. 244, 81 L.Ed. 360 (1937); *cf. United States v. Creek Nation*, 295 U.S.

103, 109, 55 S. Ct. 681, 79 L.Ed. 1331 (1935) (discussing the right of occupancy as compared to a fee simple).

In 1878, the United States military escorted the Arapaho onto the Wind River Reservation, where the Arapaho were settled by the Government on the Wind River Reservation despite protests by the Shoshone. *Shoshone*, 299 U.S. at 494, 57 S. Ct. 244. Against their respective wishes, the Shoshone and Arapaho Tribes were made owners in common of the Wind River Reservation, with undivided rights to the land and its accompanying mineral resources, by Congressional act. Act of Mar. 3, 1927, §§ 1, 3, 44 Stat. 1349, 1350; *Shoshone*, 299 U.S. at 494, 57 S. Ct. 244. Both Tribes continue to occupy the Wind River Reservation, which consists primarily of the reservation lands created by the Treaty of 1868, minus certain lands sold to the United States in 1872 and 1896.

In addition to establishing co-ownership of the Wind River Reservation, the Act of March 3, 1927 also permitted the Shoshone to bring claims against the Government in the Court of Claims arising from the settlement of the Arapaho. Until the passage of the Indian Claims Commission Act in 1946 (the "ICC Act"), tribes could not litigate claims against the United States without specific Congressional permission. Act of Mar. 3, 1927, §§ 1, 3, 44 Stat. 1349, 1350; *Shoshone*, 299 U.S. at 494, 57 S. Ct. 244; see also *Navajo Tribe of Indians* v. *State of New Mexico*, 809 F.2d 1455, 1460 (10th Cir. 1987) (discussing the history of the ICC Act). After receiving access to the Court of Claims, the Shoshone filed suit and were eventually awarded damages for the taking of the Shoshone's right of occupancy under the Treaty of 1868. *Shoshone*, 299 U.S. at 497-98, 57 S. Ct. 244.

On October 10, 1979, the Tribes brought suit in the United States Court of Claims, alleging that the Government breached fiduciary and statutory duties owed to the Tribes from August 14, 1946 onward by mismanaging the reservation's natural resources and the income derived from such resources. The date of August 14, 1946 chosen by the Tribes coincides with the passage of the ICC Act. The ICC Act provided a five-year window of time during which tribes could submit to the Indian Claims Commission all of their claims against the Government that accrued before August 13, 1946. Courts have therefore held that claims "accruing before August 13, 1946" that were not filed with the Commission by August 13, 1951 cannot be submitted to any court, administrative agency, or the Congress. 60 Stat. 1052 (formerly 25 U.S.C. § 70k); *Navajo Tribe*, 809 F.2d at 1461; *Catawba Indian Tribe of S.C. v. United States*, 24 Cl.Ct. 24, 29 (1991).

The Court of Federal Claims severed the Tribes' present action into four segments: (1) claims relating to mineral rights, including sand and gravel resources; (2) claims relating to royalties associated with oil and gas deposits; (3) all other claims relating to oil and gas extraction; and (4) claims relating to trust fund mismanagement. *Shoshone Indian Tribe*, 51 Fed. Cl. at 62.

B. *Sand and Gravel Litigation*

The current appeal stems from the first segment of litigation and involves the alleged mismanagement of sand and gravel resources by the Government. The sand and gravel claims of the Tribes were severed from the rest of the claims by order of the Court of Federal Claims. *The Shoshone Indian Tribe of the Wind River*

Reservation v. United States, No. 458a-79-459a-79L (Fed. Cl. June 13, 2001) (order severing claims).[1]

In its pre-trial motions related to the sand and gravel claims, the Government moved the Court of Federal Claims to bar any claim by the Tribes that accrued prior to October 10, 1973, the date that corresponds to six years before the Tribes' complaint was filed. *Shoshone Indian Tribe*, 51 Fed. Cl. at 61. The Government argued that 28 U.S.C. § 2501, which imposes a six-year statute of limitations on claims brought against the United States, should apply to limit the Tribes' ability to recover for alleged injuries occurring between 1946 and 1973. *Id.* at 61-62.

In response, the Tribes cited the Department of the Interior and Related Agencies Appropriations Act, Public Law No. 108-7 (the "Act"), which provides in pertinent part:

> [N]otwithstanding any other provision of law, the statute of limitations *shall not commence to run* on any claim, including any claim in litigation pending on the date of the enactment of this Act, concerning *losses to or mismanagement of trust funds*, until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss.

Pub.L. No. 108-7 (2003) (emphasis added). An earlier version of the Act was first adopted in 1990 and has

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[1] The litigation regarding the management of oil and gas reserves on the Wind River Reservation is still pending in the Court of Federal Claims. *See The Shoshone Indian Tribe of the Wind River Reservation v. United States*, 58 Fed. Cl. 542 (2003) (interim order on motions in limine).

been adopted each year thereafter, with minor changes in 1991 and 1993.[2]

The Court of Federal Claims denied the Government's motion on November 30, 2001. *Shoshone Indian Tribe*, 51 Fed. Cl. at 61. The gravamen of the Government's motion was that the six year statute of limitations on claims against the Government provided by 28 U.S.C. § 2501 had already run on many of the Tribes' claims and that the Act therefore did not reach such claims. Relying on the plain language of the Act, the court determined that claims falling within the scope of the Act do not *accrue* until an accounting "concerning losses to or mismanagement of trust funds" is provided. Because the Tribes had not received an accounting, the Court of Federal Claims thus permitted the Tribes to present evidence of economic losses resulting from the Government's mismanagement of tribal trust funds and sand and gravel resources from 1946 onward.

The Tribes' cross-appeal concerns the Court of Federal Claims' decision denying the Tribes interest on monies that the Government failed to collect with respect to the sand and gravel mining leases on the reservation. The Tribes argued before the Court of Federal

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[2] Pub.L. No. 101-512 (1990) originally provided:

> [N]otwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with the accounting of such funds.

In 1991, the clause "from which the beneficiary can determine whether there has been a loss" was added to the end of the provision. Pub.L. No. 102-154 (1991). In 1993, Congress added "including any claim in litigation pending on the date of this Act." Pub.L. No. 103-138 (1993).

Claims that 25 U.S.C. § 612, which establishes a trust for the Shoshone and Arapaho Tribes, requires the Government to pay interest on funds that the Government should have, but did not, collect and deposit in the tribal trust. In pertinent part, 25 U.S.C. § 612 provides:

> The Secretary of the Treasury, upon request of the Secretary of the Interior, is authorized and directed to establish a trust fund account for each tribe and shall make such transfer of funds on the books of his department as may be necessary . . .: Provided, *That interest shall accrue on the principal fund only, at the rate of 4 per centum per annum,* and shall be credited to the interest trust fund accounts established by this section: Provided further, That *all future revenues and receipts derived from the Wind River Reservation under any and all laws,* and the proceeds from any judgment for money against the United States hereafter paid jointly to the Shoshone and Arapahoe Tribes of the Wind River Reservation, shall be divided [between the Tribes] and *credited to the principal trust fund accounts* established herein; and the proceeds from any judgment for money against the United States hereafter paid to either of the tribes singly shall be credited to the appropriate principal trust fund account.

25 U.S.C. § 612 (2000) (emphasis added). The Tribes further argued that the general statutes governing Indian trust fund management, 25 U.S.C. §§ 155, 161a, 161b, and 162a, mandate the payment of interest. Under 25 U.S.C. § 155, miscellaneous revenues derived from tribal resources are to be deposited with the Treasury, and under 25 U.S.C. §§ 161a, 161b, and 162a,

simple interest must be collected on such accounts. *See* 25 U.S.C. §§ 155, 161a, 161b, 162a.

On June 21, 2002, the Court of Federal Claims determined that the Government would not be responsible for interest on any damages awarded to the Tribe for trust fund mismanagement. *Shoshone Interest Order*, at 2. In its order, the court reasoned that 25 U.S.C. § 612 did not provide the "necessary 'hook'" to award interest damages against the United States under the Supreme Court's decision in *United States v. Mitchell*, 463 U.S. 206, 103 S. Ct. 2961, 77 L.Ed.2d 580 (1982) ("*Mitchell II*"). *Shoshone Interest Order*, at 2. The court did not address the availability of 25 U.S.C. §§ 155, 161a, 161b, and 162a to require the payment of interest.

On the basis of its orders of November 30, 2001 and June 21, 2002, the Court of Federal Claims (1) granted judgment in favor of the Tribes on the issue of the statute of limitations and (2) granted judgment in favor of the Government on the issue of interest. *Shoshone Final Judgment Order*, at 1. Except for these two issues, the parties have settled the claims concerning the sand and gravel resource management. *The Shoshone Indian Tribe of the Wind River Reservation v. United States*, No. 458a-79L, 459a-79L (Fed. Cl. Oct. 4, 2002) (order approving partial settlement).

This Court has jurisdiction of the appeal and cross-appeal pursuant to 28 U.S.C. § 1295(a)(3).

II. DECISION

A. *Standard of Review*

The issue before us is one of statutory construction. This court reviews the construction and interpretation

of governing statutes *de novo*. *Massie v. United States*, 166 F.3d 1184, 1187 (Fed. Cir. 1999); *Dock v. United States*, 46 F.3d 1083, 1086 (Fed. Cir. 1995). The plain language of a statute is controlling. *Int'l Bus. Machs. Corp.* v. *United States*, 201 F.3d 1367, 1373 (Fed. Cir. 2000).

B. *The Act*

1. Statute of Limitations

In challenging the Court of Federal Claims' decision concerning the statute of limitations for the Tribes' claims, the Government relies on the ambiguous language of the House and Senate Reports associated with the Act, rather than on the language of the statute itself. The language of the statute is the best indication of Congress's intent. *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118, 100 S. Ct. 2051, 64 L.Ed.2d 766 (1980). When the language of a statute is plain on its face, it is inappropriate to turn to the legislative history.[3] *Dep't of Hous. & Urban Dev. v.*

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[3] Only two courts have interpreted the Act prior to this appeal. In the unpublished decision of *Assinboine & Sioux Tribes of the Fort Peck Indian Reservation*, No. 773-87L (Fed. Cl. 1995), the Court of Federal Claims found that the Act deferred the accrual of the statute of limitations until an accounting was provided. That court cited the legislative history surrounding the Act's renewal in 1993, specifically a House Report that provided that the purpose of the Act was to "protect the rights of tribes and individuals until reconciliation and audit of their accounts has been completed." H.R.Rep. No. 103-158, at 57 (1993).

In *Cobell v. Babbitt*, a district court determined that the Act merely tolls the statute of limitations. 30 F. Supp.2d 24 (D. D. C. 1998). Citing the same sentence from the House Report relied on in *Assinboine*, the District Court came to the opposite conclusion from the legislative history. *Id.* at 44.

Rucker, 535 U.S. 125, 132, 122 S. Ct. 1230, 152 L.Ed.2d 258 (2002).

The statute of limitations provision of 28 U.S.C. § 2501 places an express limit on the Government's waiver of sovereign immunity for every claim within the jurisdiction of the Court of Federal Claims. *Soriano v. United States*, 352 U.S. 270, 273, 77 S. Ct. 269, 1 L.Ed.2d 306 (1957); *Hart v. United States*, 910 F.2d 815, 817 (Fed. Cir. 1990). Statutes that toll the statute of limitations, resurrect an untimely claim, defer the accrual of a cause of action, or otherwise affect the time during which a claimant may sue the Government also are considered a waiver of sovereign immunity. *See Martinez v. United States*, 333 F.3d 1295, 1316 (Fed. Cir. 2003) (noting that exceptions to statutes of limitations on suits against the Government are not to be implied); *see also Soriano*, 352 U.S. at 276, 77 S. Ct. 269. Such statutes must be construed strictly and must clearly express the intent of Congress to permit a suit against the Government. *Dep't of the Army v. Blue Fox, Inc.*, 525 U.S. 255, 261, 119 S. Ct. 687, 142 L.Ed.2d 718 (1999) ("We have frequently held, however, that a waiver of sovereign immunity is to be strictly construed, in terms of its scope, in favor of the sovereign. . . . Such a waiver must also be 'unequivocally expressed' in the statutory text." (citations omitted)); *United States v. Mottaz*, 476 U.S. 834, 841, 106 S. Ct. 2224, 90 L.Ed.2d 841 (1986); *Bath Iron Works Corp. v. United States*, 20 F.3d 1567, 1572 (Fed. Cir. 1994). By the plain language of the Act, Congress has expressly waived its sovereign immunity and deferred the accrual of the Tribes' cause of action until an accounting is provided.

The operative language of the Act is the combination of the phrases "[n]otwithstanding any other provision of law" and the directive that the statute of limitations "shall not commence to run" on any claim until an accounting is provided from which the Tribes can discern whether any losses occurred which would give rise to a cause of action against the trustee. The introductory phrase "[n]otwithstanding any other provision of law" connotes a legislative intent to displace any other provision of law that is contrary to the Act, including 28 U.S.C. § 2501. *See, e.g., Marcello v. Bonds*, 349 U.S. 302, 310-11, 75 S. Ct. 757, 99 L.Ed. 1107 (1955) (finding the inclusion of the phrase "Notwithstanding any other provision of law" in earlier drafts of a bill enough to show the intent of Congress to supersede § 5(c) of the Administrative Procedure Act even though the final bill deleted the language); *Watt v. Alaska*, 451 U.S. 259, 280, 101 S. Ct. 1673, 68 L.Ed.2d 80 (1981) (Stewart, J., dissenting) (stating that Congress "ideally" would have used the phrase "notwithstanding any other provision of law" to express its intent to have the Wildlife Refuge Revenue Sharing Act of 1964 supersede the Mineral Leasing Act of 1920).

The next important phrase of the Act, "shall not commence to run," unambiguously delays the commencement of the limitations period until an accounting has been completed that reveals whether a loss has been suffered. As the Tribes point out, most statutes use the word "toll" when the purpose of the statute is to interrupt the statute of limitations. *See, e.g.*, 12 U.S.C. § 3419 (2000); 15 U.S.C. § 6606(e)(4) (2000); 21 U.S.C. § 1604(b)(3)(C) (2000); 29 U.S.C. § 1854(f) (2000). Congress's choice of the phrase "shall not commence to run" instead of "tolls" should be given effect. There exists a strong presumption that "Congress expresses its intent

through the language it chooses" and that the choice of words in a statute is therefore deliberate and reflective. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 433 n. 12, 436, 107 S. Ct. 1207, 94 L.Ed.2d 434 (1987); *see also Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 223, 106 S. Ct. 2485, 91 L.Ed.2d 174 (1986) ("Normal principles of statutory construction require that we give effect to the subtleties of language that Congress chose to employ. . . ."); *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521, 102 S. Ct. 1912, 72 L.Ed.2d 299 (1982) (refusing to give a restrictive meaning to the word "person" because Congress could have, but did not, use more particular language).

Unlike the Government, we see no ambiguity in the language used by Congress. The clear intent of the Act is that the statute of limitations will not begin to run on a tribe's claims until an accounting is completed. We therefore hold that the Act provides that claims falling within its ambit shall not accrue, i.e., "shall not commence to run," until the claimant is provided with a meaningful accounting.[4] This is simple logic—how can a

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[4] Our interpretation of the Act also comports with an examination of other statutes that affect the accrual of a cause of action. For example, the Court of Federal Claims is permitted to hear claims by the Pueblo of Isleta tribe regardless of the time incurred. The applicable statute provides:

> Notwithstanding sections 2401 and 2501 of title 28, United States Code, and section 12 of the Act of August 13, 1946 (60 Stat. 1052), or any other law which would interpose or support a defense of untimeliness, jurisdiction is hereby conferred upon the United States Court of Federal Claims to hear, determine, and render judgment on any claim by Pueblo of Isleta Indian Tribe of New Mexico against the United States with respect to any lands or interests therein the State of New Mexico or any adjoining State held by aboriginal title or otherwise which

beneficiary be aware of any claims unless and until an accounting has been rendered?

The interpretation of the Act provided by this court also comports with fundamental trust law principles. Beneficiaries of a trust are permitted to rely on the good faith and expertise of their trustees; because of this reliance, beneficiaries are under a lesser duty to discover malfeasance relating to their trust assets. *Loudner v. United States*, 108 F.3d 896, 901 (8th Cir.1997); *Cobell v. Norton*, 260 F. Supp.2d. 98, 104 (D.D.C.2003); *Manchester Band of Pomo Indians v. United States*, 363 F.Supp. 1238 (N.D.Cal.1973). As the Supreme Court explained in *Mitchell II*, "[a] trusteeship would mean little if the beneficiaries were required to supervise the day-to-day management of their estate by their trustee or else be precluded from recovery for mismanagement." 463 U.S. at 227, 103 S. Ct. 2961.

A cause of action for breach of trust traditionally accrues when the trustee "repudiates" the trust and the beneficiary has knowledge of that repudiation. *Hopland Band of Pomo Indians v. United States*, 855

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were acquired from the tribe without payment of adequate compensation by the United States.

Pub.L. No.104-198 (1996).

The Act's introductory phrase "notwithstanding any other provision of law" parallels the above recitation listing a number of statute of limitations provisions and declaring that they are inapplicable. Moreover, like the passage quoted, the Act specifically outlines the types of claims that are exempted from the standard statute of limitations. In the case of the Pueblo of Isleta tribe, the claims involve the Government's payment of inadequate compensation for tribal lands. In the case before this court, the claims are limited to those "concerning losses to or mismanagement of trust funds." We address the interpretation of that phrase *infra* at Part II.B.2 of this opinion.

F.2d 1573 (Fed. Cir.1988); *Restatement (Second) of Trusts* § 219 (1992); *Cobell*, 260 F. Supp.2d at 105; *Manchester Band of Pomo Indians*, 363 F. Supp. at 1249. A trustee may repudiate the trust by express words or by taking actions inconsistent with his responsibilities as trustee. *Jones v. United States*, 801 F.2d 1334, 1336 (Fed. Cir. 1986); *Philippi v. Philippe*, 115 U.S. 151, 5 S. Ct. 1181, 29 L.Ed. 336 (1885). The beneficiary, of course, may bring his action as soon as he learns that the trustee has failed to fulfill his responsibilities. 3 *Scott on Trusts* §§ 199.3, 205 (2001). It is often the case, however, that the trustee can breach his fiduciary responsibilities of managing trust property without placing the beneficiary on notice that a breach has occurred. It is therefore common for the statute of limitations to not commence to run against the beneficiaries until a final accounting has occurred that establishes the deficit of the trust. 76 *Am.Jur.2d Trusts* § 440 (2000); *McDonald v. First Nat'l Bank of Boston*, 968 F. Supp. 9, 14 (D.Mass. 1997).

In this case, the United States is the trustee for the Tribes, having assumed the relationship of trustee-beneficiary pursuant to treaties and statutes. That a general trustee relationship exists between the Government and tribal nations has long been recognized by the Supreme Court. *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 8, 8 L.Ed. 25 (1831) (describing the relationship of tribes with the United States as that of a "ward to his guardian"); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 557, 8 L.Ed. 483 (1832) (elaborating on a duty of protection undertaken by the United States with respect to the native tribes); *Mitchell II*, 463 U.S. at 225, 103 S. Ct. 2961 (noting the "undisputed exis-

tence of a general trust relationship between the United States and the Indian people").

Because of its treaty and statutory obligations to tribal nations, the United States must be held to the "most exacting fiduciary standards" in its relationship with the Indian beneficiaries. *Coast Indian Cmty. v. United States*, 213 Ct. Cl. 129, 550 F.2d 639, 652 (1977). The Indian Tribes, as domestic dependent nations, were subjected to the imposition of the trustee-beneficiary relationship and have become reliant upon their trustee to carry out trustee responsibilities. *Mitchell II*, 463 U.S. at 225, 103 S. Ct. 2961.

2. *The Scope of the Act*

In addition to interpreting the Act's effect on the statute of limitations, this Court must determine which claims are within the scope of the Act. The Act postpones the commencement of the statute of limitations for "any claim . . . concerning *losses to or mismanagement of trust funds.*" (emphasis added). In its interpretation of the Act, the Court of Federal Claims focused on the disjunctive term "or" between the two phrases "losses to" and "mismanagement of" tribal trust funds. *Shoshone Indian Tribe*, 51 Fed. Cl. at 68. The court determined that "mismanagement of trust funds" plainly covers a breach of fiduciary duty in the management of money already received in the trust. *Id.* The court then interpreted "losses to . . . trust funds" as corresponding to the Government's mismanagement of trust assets and the "breach of its trust duty to 'make the trust property productive'. . . ." *Id.* The interpretation by the court below thus permitted the Tribes to bring claims from 1946 onward relating to the Government's management of the sand and gravel

leasing, including claims that the Government did not receive the best possible price for the leases negotiated. *Id.*

As part of its appeal, the Government argues that the Act applies only to claims for the mismanagement or loss of tribal funds that were actually collected and deposited into the tribal trusts by the Government. Under the Government's proposed interpretation of "losses to or mismanagement of trust funds," the phrase "mismanagement of trust funds" would connote active misconduct relating to the tribal funds and "losses to . . . trust funds" would apply to "purely passive behavior" resulting in a decrease in the trust funds. Under the Government's theory of liability, the Act would not apply to losses that the Tribes alleged occurred because of the Government's failure to collect rents or to collect rents in a timely manner or to timely deposit such rents into the tribal trust accounts.

We reject the Government's narrow reading of the Act. If the Government's interpretation were adopted, the term "losses to" would be redundant—the mismanagement of trust funds after their collection necessarily results in a loss to such funds. *Shoshone Indian Tribe*, 51 Fed. Cl. at 68. Accepted rules of statutory construction suggest that we should attribute meaning to all of the words in the Act if possible. *Montclair v. Ramsdell*, 107 U.S. 147, 152, 2 S. Ct. 391, 27 L.Ed. 431 (1882) ("It is the duty of the court to give effect, if possible, to every clause and word of a statute. . . ."); *TRW Inc. v. Andrews*, 534 U.S. 19, 31, 122 S. Ct. 441, 151 L.Ed.2d 339 (2001); Norman J. Singer, *Sutherland on Statutory Construction* § 46.06, at 181-96 (6th ed. 2000).

At the same time, the Court of Federal Claims' interpretation of the Act's language is overly expansive. We first must note that the Supreme Court's recent decision in *United States v. Navajo Nation* may moot the Tribes' claims relating to a breach of trust for *asset* mismanagement pursuant to the Indian Mineral Leasing Act ("IMLA") of 1938, i.e., claims that the Government failed to obtain the best possible market rates for the sand and gravel contracts. *See United States v. Navajo Nation*, 537 U.S. 488, 123 S. Ct. 1079, 155 L.Ed.2d 60 (2003). In *Navajo Nation*, the Supreme Court held that the IMLA does not impose a fiduciary obligation on the Government to manage the negotiation of tribal coal leases and maximize the lease revenues received. *Id.* at 507, 123 S. Ct. 1079. Reviewing the responsibilities owed by the Government to the Navajo under the IMLA, the Court determined that the Government was charged with approving mineral leases and regulating mining operations, but was not otherwise responsible for obtaining the highest and best price for the leases of tribal coal deposits. *Id.* at 507-08, 123 S. Ct. 1079; *see also* 25 U.S.C. § 396a (requiring that the Secretary of the Interior approve mineral leases); 25 U.S.C. § 396d (providing that the Secretary promulgate regulations relating to mining operations). While the Court in *Navajo Nation* specifically limited its holding to coal leasing, 537 U.S. at 508 n. 11, 123 S. Ct. 1079, the IMLA alone does not impose any additional responsibilities on the Government relating to the management of sand and gravel leases.[5] *See* 25 U.S.C. § 396a *et seq.; see also*

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[5] We do not, in this opinion, reach the question of whether a claim for asset mismanagement under statutes other than the IMLA is viable. *See Navajo Nation v. United States*, 347 F.3d 1327, 1332 (Fed. Cir.2003). The issue of whether "a network of

25 C.F.R. § 211.3 (defining mineral to include sand and gravel resources, thus establishing that such resources are subject to the IMLA). Like the coal leases at issue in *Navajo Nation*, the Government's responsibilities relating to the management of mineral assets such as sand and gravel is limited to the general obligation to approve leases and regulate removal operations under 25 U.S.C. § 396a and § 396d respectively. In light of *Navajo Nation*, we are compelled to find that the Tribes' argument that the Government mismanaged its sand and gravel assets is not a valid claim for relief given that the Government did not have a fiduciary or statutory duty to maximize the prices obtained under the leases entered into between the tribes and third parties. As such, the language in the Act "losses to or mismanagement of trust funds" cannot be used to delay the accrual of a cause of action for failure to obtain a maximum price of the mineral assets since such an action is not within the contemplated scope of the IMLA.

Even if a claim for a breach of the fiduciary duty to obtain a maximum return from the mineral assets had been available, however, the plain language of the Act excludes such a claim. The Act covers claims concerning "losses to . . . trust *funds* " rather than losses to mineral trust *assets*. While it is true that a failure to obtain a maximum benefit from a mineral asset is an example of an action that will result in a loss to the trust, the Act's language does not on its face apply to claims involving trust *assets*. The Court of Federal Claims therefore erred in equating the mismanagement of trust *assets* with "losses to . . . trust *funds*."

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other statutes and regulations" may create a trust obligation for tribal asset management on the part of the Government is currently on remand to the Court of Federal Claims. *Id.*

While *Navajo Nation* forecloses holding the United States responsible for allegedly failing to maximize the return from the Tribes' sand and gravel mining leases, it does not foreclose liability for failing to manage or collect the *proceeds* from the approved mining contracts in violation of the trust responsibilities owed under the implementing regulations of the IMLA. Pursuant to 25 C.F.R. § 211.40 and related regulations in 30 C.F.R., Subchapters A and D, the Government collects and manages all payments relating to the mineral leases unless such leases specify otherwise. The Government then must deposit and accrue interest on such proceeds pursuant to the general trust provisions of 25 U.S.C. §§ 161a, 161b, and 162a, and, in the case of the Tribes, pursuant to 25 U.S.C. § 612. It therefore is clear that the Tribes have a possible claim against the United States for the alleged breach of the Government's fiduciary duty to manage and collect revenues derived from the mining leases.

A review of the language of the Act confirms that the Act defers the accrual of a cause of action relating to the Government's fiduciary duties to collect revenue for the Tribes' leases. In the context of the Act, "losses to . . . trust funds" may be understood to cover losses resulting from the Government's failure to timely collect amounts due and owing to the Tribes under its sand and gravel contracts. We therefore interpret the phrase "losses to . . . trust funds" to mean losses resulting from the Government's failure or delay in (1) collecting payments under the sand and gravel contracts, (2) depositing the collected monies into the Tribes' interest-bearing trust accounts, or (3) assessing penalties for late payment. Fiduciary breaches such as these result

in losses to trust funds that are separate and distinct from the mismanagement of trust funds once collected.

We finally note that the interpretation of "losses to . . . trust funds" as accounts receivable due and owing to the Tribes has certain evidentiary advantages. As part of its duties, a trustee must keep clear and accurate accounts, showing what he has received, what he has expended, what gains have accrued, and what losses have resulted. 2A *Scott on Trusts* § 172 (2001). An accounting alone will not reveal the mismanagement of tribal assets; a comparison with historical market prices is required, creating a large burden on the parties and the courts. In contrast, the comparison of pertinent mining contracts with the results of an accounting will reveal what income was required to be received by the Government but was either not received or was received late.

Based on the language of the Act and statutory rules of construction, we conclude that the Act covers any claims that allege the Government mismanaged funds after they were collected, as well as any claims that allege the Government failed to timely collect amounts due and owing to the Tribes under its sand and gravel contracts.

C. *Interest*

On cross-appeal, the Tribes argue that the Government should pay interest on amounts that it should have received, but did not receive, as a result of sales of the reservation's sand and gravel interests. We hold that the Tribes are permitted to receive interest on monies that the Government was obligated to collect on behalf of the Tribes under the leases, but did not collect or delayed in collecting.

Pursuant to 28 U.S.C. § 2516, a court is prohibited from awarding prejudgment interest against the United States unless such interest is specifically authorized by a contract or act of Congress. 28 U.S.C. § 2516 (2000). In addition, the Supreme Court held in *Mitchell II* that a claimant may recover against the United States only if he or she demonstrates that a source of substantive law can "fairly be interpreted as mandating compensation by the Federal Government for the damage sustained." 463 U.S. at 216-17, 103 S. Ct. 2961.

In denying interest to the Tribes, the Court of Federal Claims determined that 25 U.S.C. § 612, which specifically requires interest to accrue on proceeds deposited in trust accounts for the Shoshone and Arapaho Tribes, is not money-mandating under *Mitchell II*. *Shoshone Interest Order*, at 2. To support its decision, the court stated that because 25 U.S.C. § 612 requires the payment of interest on post-judgment awards but is silent as to pre-judgment interest awards, pre-judgment interest is not contemplated under the statute. *Id.*

The Court of Federal Claims erred in its analysis of the language of 25 U.S.C. § 612. Although the court was correct that the statute does not use the express term "pre-judgment interest," we interpret the statute as providing a substantive basis for the award of interest as part of the Tribes' damages. *See Short v. United States*, 50 F.3d 994, 998 (Fed. Cir.1995). Under 25 U.S.C. § 612, the Government is obligated to pay interest on *all* revenues derived from the Wind River Reservation, not just the revenues that the Government collected. Specifically, 25 U.S.C. § 612 requires the Secretary of the Treasury to credit to a principal trust fund

for the Tribes "*all* future revenues and receipts derived from the Wind River Reservation under any and all laws." (emphasis added). In addition, 25 U.S.C. § 612 provides that "interest shall accrue on the principal fund only, at the rate of 4 per centum per annum." To the extent that the Government did not deposit "*all* future revenues and receipts derived from the Wind River Reservation," which in the present case would include revenues and receipts derived from the sand and gravel contracts, it has breached the provisions of 25 U.S.C. § 612.[6] The direct consequence of this breach is that the Tribes were denied interest on the full amount that should have been, but was not, collected under their sand and gravel contracts.

Because the Government was obligated under 25 U.S.C. § 612 to both credit the principal account with *all* future revenues and receipts and to accrue interest at the stated rate, the provisions of 25 U.S.C. § 612 are therefore clear and unambiguous and are interpreted to permit recovery for interest on revenues and receipts that the Government failed to collect or delayed in collecting under the Tribes' sand and gravel contracts.[7]

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[6] The legislative history of 25 U.S.C. § 612 also reveals that Congress anticipated that most of the funds to be deposited in the trust would come from the mineral resources on the reservation. *See* H.R. Rep. No. 80-172, at 2 (1947); S. Rep. No. 80-117, at 2 (1947).

[7] The dissent erroneously considers the interest that the Government is required to pay on the Tribes' trust principal under 25 U.S.C. § 612 to be a form of pre-judgment interest. Unlike the situation in *Mitchell II*, however, the Government had an obligation to collect the payments from the Tribes' sand and gravel leases and deposit such payments in interest-bearing trust accounts. By failing to reasonably manage the collection of lease payments, the Government deprived the Tribes of not only trust

Adding even further support for this interpretation is the long-standing canon of statutory construction that "statutes are to be construed liberally in favor of the Indians. . . ." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S. Ct. 2399, 85 L.Ed.2d 753 (1985); *Winters v. United States*, 207 U.S. 564, 576, 28 S. Ct. 207, 52 L.Ed. 340 (1908) (stating that ambiguities should be resolved "from the standpoint of the Indians"); *Choate v. Trapp*, 224 U.S. 665, 675, 32 S. Ct. 565, 56 L.Ed. 941 (1912) (stating that pro-Indian statutory construction has been a canon of construction used since the early 1800s); *see Chickasaw Nation v. United States*, 534 U.S. 84, 93-95, 122 S. Ct. 528, 151 L.Ed.2d 474 (2001) (recognizing the pro-Indian canon of construction, which "assumes Congress intends its statutes to benefit the tribes"); *see also Thompson v. Cherokee Nation of Okla.*, 334 F.3d 1075, 1090 (Fed. Cir. 2003) (finding it unnecessary to utilize the Indian canon of construction because the statute at issue was not ambiguous). We therefore hold that 25 U.S.C. § 612 mandates the payment of interest on monies that the Gov-

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principal, but also the interest that would have been generated on that principal had the Government not breached its fiduciary responsibilities. This decision therefore does not award pre-judgment interest, but rather awards interest as a part of the damages sustained by the Government's breach. *See Short v. United States*, 50 F.3d 994, 999-1000 (Fed. Cir.1995). Under the analysis set forth by the dissent, if the Government failed to collect any payments despite being under an obligation to do so, the Government would experience no liability whatsoever for lost interest. If the Government mismanaged principal, however, it would be liable for interest. Such a distinction is untenable; it would perversely (and proportionally) reward the Government for inaction that violates the Government's fiduciary duties to collect funds and accrue interest.

ernment was contractually obligated to collect, but failed to collect or delayed in collecting.

The Supreme Court's decision in *Peoria Tribe of Indians of Oklahoma v. United States* further supports this court's reversal of the Court of Federal Claims' decision. In *Peoria Tribe*, the Government entered into a treaty that required it to sell tribal lands at public auctions and accrue interest on the proceeds for the benefit of the tribe. 390 U.S. 468, 469, 88 S. Ct. 1137, 20 L.Ed.2d 39 (1968). The Government sold tribal lands at private sales instead, resulting in lower prices received for the property. *Id.* The Court of Claims and the Indian Claims Commission denied the tribe damages for the failure to invest the proceeds that "would have been received had the United States not violated the treaty." *Id.* at 473, 88 S. Ct. 1137. The Supreme Court reversed, holding that the Government had an obligation to invest the money that should have, but was not, collected from the sale of land. *Id.* at 472-73, 88 S. Ct. 1137. Accordingly, the Supreme Court held that the Government was required to pay interest on the potential, rather than actual, proceeds of the sales as part of the damages for breach of the treaty. *Id.* at 470, 88 S. Ct. 1137; *see also United States v. Blackfeather*, 155 U.S. 180, 193, 15 S. Ct. 64, 39 L.Ed. 114 (1894) (permitting interest to be paid on amounts that should have been, but were not, collected upon the sale of the tribes' lands).

Peoria Tribe is directly on point. The Government has a binding obligation to collect revenues from the sand and gravel contracts and earn interest on the

revenues derived. *See* 25 U.S.C. § 612.[8] On the basis of *Peoria Tribe*, damages are therefore due to the Tribes for the failure to invest proceeds that "would have been received had the United States not violated" its fiduciary obligation to collect amounts due under the sand and gravel leases. *Peoria Tribe*, 390 U.S. at 473, 88 S. Ct. 1137.

We also find merit in the Tribes' argument that the general provisions for tribal trust management and interest accrual found in 25 U.S.C. §§ 161a, 161b, and 162a mandate the payment of interest. When considered in conjunction with the Government's fiduciary duty to collect revenue from mineral leases under regulations implementing the IMLA, these trust fund statutes create an obligation for the Government to pay interest on amounts that the Government failed to collect. IMLA, 52 Stat. 347, 25 U.S.C. § 396 *et seq.* (2000); 25 C.F.R. § 211.40.

This court has previously held that 25 U.S.C. §§ 161a, 161b, and 162a mandate the payment of interest under certain circumstances. In *Short v. United States*, the Government held in trust profits generated from the sale of certain natural resources on the Hoopa Valley Reservation and therefore had an obligation to accrue interest on those amounts according to 25 U.S.C. §§ 161a, 161b, and 162a. 50 F.3d at 999-1000. The Government wrongfully disbursed certain funds to one tribe on the reservation to the detriment of the other

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[8] As discussed in Part II.B.2, the Government did not have a trust responsibility to obtain the best possible market rates for the sand and gravel contracts. It therefore is obvious that the Tribes cannot recover interest on the amounts that the Tribes did not receive because of the Government's alleged failure to obtain the maximum price for the sand and gravel assets.

tribe coexisting on the reservation. Relying on *Peoria Tribe*, the Court granted interest based on 25 U.S.C. §§ 161a, 161b, and 162a, not as an award on damages, but "as part of the damages award itself." *Id.*

Under *Short* and *Peoria Tribe*, when the Government has a clear statutory fiduciary duty to collect or manage funds and further undertakes the duty to earn interest on those funds, the failure of the Government to collect or manage such funds in accordance with its obligations will result in an award of damages for that failure and an award of interest on the amount mismanaged or not collected. As was the case in *Short* and *Peoria Tribe*, the Government here has a separate and distinct statutory fiduciary obligation to pay the interest on the funds it failed to collect or otherwise mismanaged.

The Government argues that reliance on *Short* would conflict with the Court of Claims decision in *Mitchell v. United States*, 229 Ct. Cl. 1, 664 F.2d 265 (1981). That decision, which led to the Supreme Court decision in *Mitchell II*, is also binding on this court. In *Mitchell*, the Court of Claims held that the mismanagement of timberlands by the United States would give rise to a damages award, but not to an award of interest on monies that plaintiffs might recover for the mismanagement of trust assets. In its decision, however, the court did not discuss or reconcile its decision with the binding Supreme Court precedent of *Peoria Tribe*. In affirming the Court of Claims' decision, the Supreme Court in *Mitchell II* also did not address the denial of interest.

In any event, the present case is distinguishable from *Mitchell*. The Tribes point to a definitive requirement[9] that the Government credit its trust accounts with its sand and gravel proceeds and earn interest on those trust funds. *See* 25 U.S.C. § 612; *see also* 25 C.F.R. § 211.40; 25 U.S.C. §§ 161a, 161b, and 162a. In *Mitchell*, however, the Government's duties arose from a network of statutes relating to timber management, none of which required the Government to deposit the proceeds into an interest-bearing tribal trust account. *See* 25 U.S.C. § 406 (providing that payment for timber sales should be made to the owner of the land or disposed of for their benefit); 25 U.S.C. § 407 (providing that timber sale proceeds from unallotted lands should be dispersed "as determined by the governing bodies of the tribes concerned and approved by the Secretary"); 25 U.S.C. §§ 323-325 (providing that compensation received for rights of way should be disposed of in accordance with enacted regulations of the Secretary, which in turn provide that the consideration be paid to the landowner under 25 C.F.R. § 169.14 (2003)).[10] Unlike *Short* or *Peoria Tribe*, the Government in *Mitchell* never placed the proceeds into a trust to earn interest (*Short*) or even had the obligation to do so (*Peoria Tribe*).

In light of *Peoria Tribe* and the statutory language of 25 U.S.C. § 612, we hold that the Tribes are entitled to

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[9] A general requirement to deposit miscellaneous funds in trusts, such as 25 U.S.C. § 155, would be unlikely to fulfill the standards required in *Mitchell II*.

[10] Other statutes listed in *Mitchell* do not involve the sale or leasing of tribal assets. 25 U.S.C. § 466 (requiring sustainable yield harvesting); 25 U.S.C. § 318a (authorizing the appropriation of money for reservation roads).

interest on monies that the Government was contractually obligated to collect, but did not collect or delayed in collecting, on behalf of the Tribes. We further hold that the same interest obligation arose under the Government's duty to collect mineral royalties pursuant to 25 C.F.R. § 211.40 and to pay interest on such royalties pursuant to the general trust management statutes of 25 U.S.C. §§ 161a, 161b, and 162a.

III. CONCLUSION

We hold that the Department of the Interior and Related Agencies Appropriations Act, Public Law No. 108-7, suspends the statute of limitations for certain trust claims until an accounting of the trust is received. The claims covered by the Act include claims relating to the Government's mismanagement of tribal trust funds after funds are deposited in trust and claims relating to the Government's failure to timely collect amounts due and owing to the Tribes under its sand and gravel contracts.

We further hold that the Tribes are entitled to interest on amounts that the Government was contractually obligated to collect, but did not collect or delayed in collecting on behalf of the Tribes under both 25 U.S.C. § 612 and the combination of 25 C.F.R. § 211.40 and 25 U.S.C. §§ 161a, 161b, and 162a. We remand for further proceedings consistent with this opinion. Based on the foregoing, we

AFFIRM-IN-PART, REVERSE-IN-PART, AND REMAND.

IV. COSTS

No costs.

RADER, Circuit Judge, dissenting-in-part.

Although I agree with the court on the statute of limitations and the liability for mismanagement of trust funds but not assets, I respectfully disagree with its construction of 25 U.S.C. § 612. As a general proposition, 28 U.S.C. § 2516 relieves the United States of any liability for prejudgment interest, except where Congress has expressly authorized that payment. *See Library of Congress v. Shaw*, 478 U.S. 310, 318, 106 S. Ct. 2957, 92 L.Ed.2d 250 (1986) ("The consent necessary to waive the traditional immunity [against liability for prejudgment interest] must be express, and it must be strictly construed.") (quoting *United States v. N.Y. Rayon Importing Co.*, 329 U.S. 654, 659, 67 S. Ct. 601, 91 L.Ed. 577 (1947)). Section 612, to my eyes, does not expressly authorize awarding prejudgment interest as a part of the damages.

That section places "all revenues and receipts derived from the Wind River Reservation under any and all laws" in a trust account where interest would accrue on the principal at four percent per year. *See* 25 U.S.C. § 612. Section 612 thus makes the United States responsible only for interest on funds actually collected and deposited in the trust account. This language does not obligate interest on funds that the United States should have collected or should have deposited. Accordingly, I do not read § 612 to overcome the general proscription against prejudgment interest.

For the same reason, the Court of Claims' en banc decision in *Mitchell v. United States*, 229 Ct. Cl. 1, 664

F.2d 265 (1981), *aff'd*, 463 U.S. 206, 103 S. Ct. 2961, 77 L.Ed.2d 580 (1983) (*Mitchell II*), governs this case. In *Mitchell II*, the court read Indian trust fund statutes of general applicability—25 U.S.C. §§ 161a, 161b, and 162 (similar in many respects to § 612)—to deny the Indian tribes interest on claims stemming from mismanagement of trust assets. The court stated unequivocally that the tribes "are not entitled, however, to such interest on any unpaid amounts they may now recover in the present suit. . . . Those [unpaid] sums or their equivalent were never held by the Government for plaintiffs, were not subject to the specific interest provisions . . . and there is no statute awarding back-interest on such unpaid compensation now awarded by the court in this suit." *Mitchell II*, 664 F.2d at 275. Accordingly, the *Mitchell II* court denied those tribes, very similarly situated to the tribes in this case, interest on uncollected funds.

The court today distinguishes *Mitchell II* because it reads § 612 to create a definitive requirement that the United States deposit proceeds in an interest-bearing trust. The court observes that *Mitchell II* evinces no requirement to deposit proceeds into an interest-bearing account. To the contrary, *Mitchell II* makes clear that "tribal trust funds and proceeds of the sale of Indian lands must be held in the Treasury at interest under 25 U.S.C. §§ 161a and 161b (1976), but an alternative under § 162a is deposit in banks" and that the United States "must as trustee exercise reasonable management zeal to get for the Indians the best rate, the statutory 4% being but a floor, not a ceiling." *Mitchell II*, 664 F.2d at 274. Thus, the statutes in *Mitchell II*, like section 612 in this case, required de-

posit and interest on the trust proceeds. On such compellingly similar facts, *Mitchell II* governs this case.

Moreover, *Peoria Tribe of Indians of Oklahoma v. United States*, 390 U.S. 468, 88 S. Ct. 1137, 20 L.Ed.2d 39 (1968), does not change the holding in *Mitchell II*. The Supreme Court in *Peoria Tribe* awarded interest on damages for malfeasance because the United States violated a treaty by selling some of the land ceded by the Indians to the United States "not by public auction, but by private sales at appraised prices lower than would have prevailed at public auction." *Peoria Tribe*, 390 U.S. at 469-70, 88 S. Ct. 1137. *Peoria Tribe* thus remedies the breach of a very specific duty, not negligence in general administration of a trust. In this case, on the other hand, the United States' liability stems from nonfeasance or negligence.

Similarly, *Short v. United States*, 50 F.3d 994 (Fed. Cir. 1995), does not (and could not) override the holding of *Mitchell II*. In *Short*, this court held the government liable for interest on funds actually held but wrongfully disbursed. That, like *Peoria*, is malfeasance. In this case, the United States never collected the monies and, thus, never placed them in any account to bear interest. Accordingly, *Short* does not apply. Indeed, the proper reconciliation of the binding precedent of *Short* and *Mitchell II* yields the following: If funds are wrongfully disbursed after deposit, the United States is liable for interest on the missing funds. But if funds have not been collected and deposited in a trust account even due to negligence, the United States is *not* liable for interest on the missing funds. Accordingly, the United States should not be liable for prejudgment interest in the present case.

APPENDIX B

UNITED STATES COURT OF FEDERAL CLAIMS

Nos. 79-458a L, 79-459a L[1]

THE SHOSHONE INDIAN TRIBE OF THE WIND RIVER RESERVATION, WYOMING, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

THE ARAPAHO INDIAN TRIBE OF THE WIND RIVER RESERVATION, WYOMING, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

Filed: Nov. 30, 2001

OPINION AND ORDER

HEWITT, Judge.

This is an action by the Eastern Shoshone Tribe (the Shoshone) and the Northern Arapaho Tribe (the Arapaho) (collectively, the Shoshone and Arapaho are re-

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[1] There are presently two separate dockets for these consolidated cases. Sand and gravel claims are docketed as 79-458a L & 79-459a L (referred to as the subdocket). All other claims are docketed as 79-458 L & 79-459 L (referred to as the main docket). The pending motion was filed in both dockets. The court is entering an order in the main docket providing that proceedings in the main docket shall also be subject to this order.

ferred to as the Tribes) for damages based on the United States' alleged breach of trust for mismanagement of the Tribes' natural resources up to the point of collection and with respect to defendant's handling of Tribal funds post-collection. *See* Eastern Shoshone and Northern Arapaho Tribes' Legal Bases for the Tribes' Theories of Recovery for Breach of Trust (Tribes' Bases) at 1. The Tribes in this consolidated action share an undivided interest in the Wind River Indian Reservation (the Reservation) in Wyoming including, but not limited to, the mineral and other resources on and under the Reservation. *Id.*

Before the court is Defendant's Motion and Supporting Memorandum Re: Statute of Limitations Issues (Def.'s Mot.) and the responsive briefing. Defendant asserts that the applicable statute of limitations, 28 U.S.C. § 2501, limits plaintiffs' recovery to a period of time beginning no earlier than October 10, 1973, that is, six years prior to the filing of the complaint in this action. The Tribes oppose defendant's motion on the basis that the statute of limitations is tolled as to their claims until defendant provides an accounting of their trust property as required by a series of appropriations enactments (the Acts).[2] *See* Response of the Eastern Shoshone and Northern Arapaho Tribes to United

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[2] The following is a complete list of the Acts since 1990: Act of November 5, 1990, Pub.L. No. 101-512, 104 Stat. 1915; Act of November 13, 1991, Pub.L. No. 102-154, 105 Stat. 990; Act of October 5, 1992, Pub.L. No. 102-381, 106 Stat. 1374; Act of November 11, 1993, Pub.L. No. 103-138, 107 Stat. 1379; Act of September 30, 1994, Pub.L. No. 103-332, 108 Stat. 2499; Act of April 26, 1996, Pub.L. No. 104-134, 110 Stat. 1321; Act of September 30, 1996, Pub.L. No. 104-208, 110 Stat. 3009; Act of November 14, 1997, Pub.L. No. 105-83, 11 Stat. 1543; Act of October 11, 2000, Pub.L. No. 106-291, 114 Stat. 922.

States' Motion RE Statute of Limitations Issues (Pls.' Resp.) at 10-11. For the following reasons, defendant's motion is DENIED.

I. Background

The litigation in this case is currently divided into four phases for adjudication. The first phase, as to which trial will be held beginning June 17, 2002, involves the Tribes' mineral trespass claims, as well as other claims, relating to specific sand and gravel pits on the Reservation. Pls.' Resp. at 2. The second phase involves extraction issues relating mostly to royalty accounting as to specific oil and gas deposits. *Id.* The third phase involves residual issues relating to oil and gas extraction, such as the failure to monitor leases. *Id.* at 2-3. The fourth phase involves the Tribes' trust money mismanagement claims. *Id.* at 3. The litigation is in various stages of discovery as to each of the phases; however, the legal questions raised in defendant's motion are ripe for judicial resolution at this juncture. Defendants Reply to Plaintiffs' Response to Defendant's Motion and Supporting Memorandum Re: Statute of Limitations Issues (Def.'s Reply) at 2.

Defendant's motion seeks to limit damages to a period of time beginning no earlier than October 10, 1973, that is, six years prior to the filing of the complaint in this action as provided by this court's statute of limitations. Def.'s Mot. at 2; 28 U.S.C. § 2501. Plaintiffs seek recovery for breaches of trust beginning in 1946 and continuing to the present date. *See* Petition filed October 10, 1979 at ¶¶ 10-11; Tribes' Bases at 29-30. Plaintiffs argue that the Acts, a series of Department of the Interior appropriations enactments listed above in note 2, toll the statute of limitations as to the entirety of the

Tribes' claims, and particularly as to those claims arising out of events prior to October 10, 1973, until the Tribes receive an accounting of their trust monies and property. *See* Tribes' Bases at 30. Resolution of the legal questions raised in defendant's motion, namely, the interaction between the Acts and the court's statute of limitations, will define both the scope of testimony to be received in the sand and gravel trial and the scope of discovery and testimony in the remaining phases of the litigation.

II. Discussion

A. Jurisdiction

The United States Court of Federal Claims has jurisdiction over the Tribes' claims pursuant to 28 U.S.C. § 1491 (1976) (the Tucker Act), and 28 U.S.C. § 1505 (1976) (the Indian Tucker Act). The Tucker Act and Indian Tucker Act waive the United States' sovereign immunity as to claims within their scope. *United States v. Mitchell*, 463 U.S. 206, 211-216, 103 S. Ct. 2961, 77 L.Ed.2d 580 (1983) (*Mitchell II*). It is established law that the United States is vested with a general trust responsibility with respect to tribal monies or properties "where the federal government takes on or has control or supervision over" such "monies or property." *Id.* at 225, 103 S. Ct. 2961 (quoting *Navajo Tribe of Indians v. United States*, 224 Ct. Cl. 171, 183, 624 F.2d 981 (1980)).[3] The statutes and regulations in the area of

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[3] *See also, e.g.*, 25 U.S.C. § 162a(d), which provides in part:

> The Secretary's proper discharge of the trust responsibilities of the United States shall include (but are not limited to) the following:
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> . . . .

mineral resources, the subject matter of this litigation, provide sufficient control to vest the defendant with a fiduciary duty with respect to the Tribes' monies and properties. It is undisputed that this court has jurisdiction over the Tribes' claims that accrued after October 10, 1973; however, jurisdiction is disputed as to the Tribes' claims that might have accrued prior to October 10, 1973. *See* Defendant's Answer (Def.'s Ans.) at 1; *see also* Def.'s Mot. at 7-10.

B. The Impact of the Acts on the Statute of Limitations

1. The Issues

The principal legal issue to be resolved by the court is the precise impact of the Acts on the statute of limitations. The general statute of limitations, 28 U.S.C. § 2501, provides that "[e]very claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues." The most recent of the Acts states:

> [N]otwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim, including any claim in litigation pending on the date of the enactment of this Act, concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been fur-

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> (6) Establishing consistent, written policies and procedures for trust fund management and accounting. . . .
>
> (8) Appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands.

25 U.S.C. § 162a(d)(6), (8).

> nished with an accounting of such funds from which the beneficiary can determine whether there has been a loss. . . .

Department of the Interior and Related Agencies Appropriations Act, 2001, Pub.L. No. 106-291, 114 Stat. 922, 939 (2000).

It is undisputed that plaintiffs' claims involve trust funds and that the Tribes have yet to receive an accounting of their trust monies or property. The parties, however, disagree as to the precise impact of the Acts on the statute of limitations: whether the Acts preserve claims time-barred before the passage of the first of Acts and, if so, whether the Acts preserve only claims related to money already received by defendant or also preserve claims for monies that should have been received by the trust but were not received because of mismanagement of the Tribes' resources. Therefore, the legal arguments in defendant's motion and the responsive briefing can be divided into two main categories. First, the parties have made arguments as to whether the Acts preserve claims that, in absence of the Acts, might otherwise be time barred-that is, arguments with respect to time. Second, the parties have made arguments with respect to the types of claims that Congress intended the Acts to cover.

The canons of statutory interpretation require the court to consider first the text of the Acts and any binding authority interpreting the text. *See* 2A Norman J. Singer, *Sutherland Statutory Construction* § 46.01, at 113-129 (6th ed. 2000) (Singer); *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108, 100 S. Ct. 2051, 64 L.Ed.2d 766 (1980) ("[T]he starting point for interpreting a statute is the language of the statute itself."). The second step of statutory

construction, which is to be employed only in the case of ambiguity in the text of the statute and in the absence of binding interpretive authority, is to consider whether guidance is afforded by relevant legislative history. *See* 2A Singer, *supra*, § 48.01 at 411-415. The parties also argue various authorities and policies which may affect the court's reliance on one or another canon of construction or aspect of the legislative history. *See* Def.'s Reply at 7-10; Pls.' Resp. at 11.

The court notes at the outset that only two courts have ruled on the impact of the Acts on a general statute of limitations. In *Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, et al.*,[4] No. 773-87L (Ct. Cl. 1995), Order of April 11, 1995, to which plaintiffs refer, this court held in an unpublished order that the Acts toll the statute of limitations, even as to claims otherwise time-barred under 28 U.S.C. § 2501, until the plaintiff receives an accounting. *Id.* at 6-7. *Assiniboine*, however, is silent as to the types of claims that are tolled by the Acts. Defendant relies on *Cobell v. Bab-*

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[4] The parties contest the legal authority of *Assiniboine*, which is an unpublished order. *See* Def.'s Reply at 7 (arguing that Rule 52.1 of RCFC prohibits citing unpublished orders as authority). Rule 52.1 does, however, permit a party to cite an unpublished opinion as "persuasive authority." *Bennett v. United States*, 30 Fed. Cl. 396, 400 n. 7 (1994), rev'd on other grounds, 60 F.3d 843 (Fed. Cir. 1995). Given the lack of prior judicial interpretation of the Acts as they affect the statute of limitations, the court finds that *Assiniboine* offers useful guidance in considering the legal issues raised by defendant's motion. The court also notes that this court's proposed revised rules (available at the court's website: http://www.uscfc.uscourts.gov) do not propose to carry forward the prohibition on citation of unpublished opinions and orders that is contained in Rule 52.1 of the court's current rules.

bitt, 30 F. Supp.2d 24 (D.D.C. 1998),[5] which disagreed with the decision in *Assiniboine* and held that the Acts do not revive claims already barred by the statute of limitations, but only "toll" the statute of limitations as to existing claims: claims arising no earlier than October 1, 1984, that is, six years prior to the passage of the first of the Acts. *Id.* at 43-44. The United States, in this case as well as in *Cobell*, concedes implicitly that the Acts may toll claims that have accrued within the period of time six years prior to the passage of the first of the Acts (1990). *See* Def.'s Reply at 4; *Cobell*, *supra*, 30 F. Supp.2d at 44 n. 25.

2. Defendant's Arguments

The central theme of defendant's argument is that this court has no jurisdiction to consider the Tribes' claims that involve alleged breaches of trust accruing prior to the court's six year statute of limitations. Def.'s Mot. at 7. The statute of limitations is a threshold jurisdictional question that cannot be waived. *See Hart v. United States*, 910 F.2d 815, 817 (Fed. Cir. 1990); *Camacho v. United States*, 204 Ct. Cl. 248, 494 F.2d 1363, 1368 (1974). Defendant argues that preserving claims that accrued prior to the six year statute of limitations is tantamount to a waiver of sovereign immunity and that, as waivers of sovereign immunity, the Acts must be strictly construed. *See* Def.'s Reply at 5-6.

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[5] The applicable statute of limitations in *Cobell* was 28 U.S.C. § 2401. An appeal in *Cobell* did not address the impact of the Acts on the statute of limitations; defendant's motion to dismiss in that case was denied on other grounds. *See generally Cobell v. Norton*, 240 F.3d 1081 (2001).

The court agrees that waivers of sovereign immunity "cannot be implied but must be unequivocally expressed." *United States v. King*, 395 U.S. 1, 4, 89 S. Ct. 1501, 23 L.Ed.2d 52 (1969). Defendant asserts that the burden of proof is on the Tribes' to justify "tolling" of the statute of limitations. Def.'s Mot. at 9 (citing *Cochran v. United States*, 19 Cl. Ct. 455, 458 (1990)). *Cochran*, however, discusses the burden a plaintiff must meet in order to show that its claim has not yet accrued, but provides no guidance as to the interpretation of the text of any particular law, such as the Acts invoked by plaintiffs in this case, in relation to the statute of limitations. *See Id.*

With regard to the text of the statute, defendant argues that "'[a]bsent some clear, contrary expression of congressional intent that would lead to the conclusion that Congress meant to revive stale claims'", plaintiffs' interpretation of the Acts is overbroad. Def.'s Reply at 7, (quoting *Cobell*, 30 F. Supp.2d at 44 (holding that "[n]either the plain language nor the legislative history of the tolling provision can support the plaintiffs' sweeping interpretation")). However, defendant provides no examples of cases where Congress did intend to revive "stale" claims as a means of comparison. Defendant simply states, "Had Congress had [sic] intended to revive old, time-barred claims it had more obvious ways of making that intent express. . . ." Def.'s Reply at 7.

Defendant in several places, does quote the language of the statute, but then stops short of addressing the meaning of the words contained in its quotation. For example, defendant characterizes the Acts as "tolling statutes" by quoting the following language from the Acts: "'shall not commence to run on any claim con-

cerning loss to or management of trust funds.'"[6] Def.'s Mot. at 14. This bare characterization, absent an explanation of the meaning of the words (or citation to authority explaining the meaning of the words), provides the court with little assistance in its main task: determining congressional intent from, in the first instance, the language of the statute.

Defendant argues that not only the "plain language" of the Acts but also their legislative history bars the revival of "stale" claims. Def.'s Reply at 8-9. According to defendant, Sen. Rep. No. 101-534, 101st Cong., 2d Sess. (relating to the initial enactment in 1990) expresses clear congressional intent to that effect. Senate Report No. 101-534 provides:

> Since the audit and reconciliation of such funds, as directed by the Committee, will require at least 5 years to complete, it is possible that the statute of limitations for any significant discrepancies uncovered during this process may have expired by the time such audits are completed.

Id. at 65. Defendant argues that this language, and especially the short number of years ("5"), shows the limited reach of the Acts: to toll the statute of limitations as to existing claims but not to revive already time-barred claims. *Id.* at 18.

With regard to the types of claims preserved by the Acts, defendant argues that the Tribes' interpretation of the tolling provision in the Acts is also overbroad in the sense that the tolling provisions only apply to ac-

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[6] Defendant does not cite to a specific bill in which this language appears; but, the court notes that this language is common to all of the Acts.

counting claims and not to resource management claims. Def.'s Reply at 11. Defendant quotes the words "any claim, including any claim in litigation pending on the date of the enactment of the Act, concerning loss to or mismanagement of trust funds" and the words "until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss." *Id.* Defendant then states that "mismanagement" and "accounting" are the "key terms," but provides neither rationale nor authority for identifying those words as the "key terms" in the quoted text. *Id.* Nor does defendant explain how the words "losses to or" or the words "whether there has been a loss" function in the text of the statute. *Id.* at 10.

Defendant argues generally that the legislative history of the Acts supports its argument that the language should be strictly interpreted to exclude resource management claims from its coverage. Without analyzing particular examples, defendant states that "plaintiffs' recitation of the legislative history of relatively contemporaneous enactments . . . demonstrates that when Congress wishes to treat the trust management issue broadly, it knows how to do so." Def.'s Reply at 11.

Defendant largely relies on a policy argument for interpreting the Acts to exclude trust funds from resource mismanagement: that such a broad reading of the statute will result in "untoward consequences." *See* Def.'s Reply at 12. According to defendant, if the United States is put in a position of having to furnish an accounting for all of the Tribes' claims, "these accountings could never be completed in a reasonable time frame." *Id.* In response to defendant's policy concerns,

the court notes that the United States has been under an obligation to provide such an accounting for more than a decade and the Tribes have yet to receive an accounting even limited to money actually collected by the defendant as trustee. The court is not in a position, on the basis of this briefing, to decide what is, or is not, a "reasonable time frame" for the furnishing of an accounting in these circumstances, except to note that ten years is already a fairly long time, and the Tribes can hardly be faulted as unreasonable for seeking what they view as their entire entitlement even if that might now take a bit longer.

3. Plaintiffs' Arguments

Plaintiffs counter defendant's central theme that this court lacks jurisdiction by arguing that the Acts are not waivers of sovereign immunity, but are merely "tolling statutes," thus permitting other than strict interpretation. Pls.' Resp. at 11. Further to this point, plaintiffs argue that where language in a statute contains "doubtful expressions" (which plaintiffs suggest is the case here), any ambiguity is to be resolved in favor of the Indians. *See id.* (citing *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S. Ct. 2399, 85 L.Ed.2d 753 (1985)) (stating that "standard principles of statutory construction do not have their usual force in cases involving Indian law").

As to the plain language of the statute, plaintiffs argue that the phrase "notwithstanding any other provision of law" appearing in Pub.L. No. 101-512, 104 Stat. 1915, 1929-1930 (1990) is a conclusive indication of congressional intent to remove sovereign immunity until the Tribes receive an accounting. *See* Tribes' Bases at 31-32, (citing *Ridgway v. Ridgway*, 454 U.S. 46, 73 n. 5,

102 S. Ct. 49, 70 L.Ed.2d 39 (1981)). Plaintiffs then argue that statutory language appearing just before the contested language in Pub.L. No. 101-512 (addressing the preservation of claims) expresses clear congressional intent that "the accounting is to extend to the earliest possible date." *See* Tribes' Bases at 33 (quoting Pub.L. No. 101-512 104 Stat. at 1929 ("until the funds held in trust for all such tribes or individuals have been audited and reconciled to the earliest possible date")). Under the canons of statutory construction, this language, while not dispositive, is intrinsic evidence that may assist the court in interpreting the overall context of the legislation. *See* 2A Singer, *supra*, § 47.02 at 211-12.[7]

With respect to the types of claims covered by the Acts, plaintiffs argue that the language "any claim" in the Acts "could not be broader." Pls.' Resp. at 12. Plaintiffs also argue that the plain meaning of the term "accounting" is not limited to bookkeeping claims; rather, the term is a condition precedent to accrual of any of its claims, including trust management claims. Id. at 12. Arguing for a broad interpretation of the term accounting, plaintiffs highlight a Black's Law Dictionary definition of "accounting" as a "report of all items of property, income, and expenses prepared by a personal representative, trustee, or guardian and given to heirs, beneficiaries, and the probate court." *Id.* (quoting Black's Law Dictionary 19 (7th ed.1999)). Plaintiffs contend that Congress' use of the phrases "loss to or mis-

[7] Plaintiffs cite no legislative history that applies exclusively to their argument that the Acts preserve previously time-barred claims. Plaintiffs' arguments based on legislative history are discussed below in relation to the types of claims that Congress intended to be within the puview of the Acts.

management of trust funds" and "such funds from which the beneficiary can determine whether there has been a loss" in the statute indicates that the United States is under a trust obligation to provide the Tribes with, "in essence, a determination of accounts receivable." Pls.' Resp. at 12.

Plaintiffs also suggest that legislative history of the Acts relating to the improvement in trust accounting supports the Tribes' argument that the Acts pertain also to resource management claims. Plaintiffs argue that a reading that excludes resource management claims from the Acts' coverage is inconsistent with the remedial purpose of the legislation demonstrated by the Acts' legislative history. Pls. Resp. at 13. In support of this argument, plaintiffs cite H.R. Rep. No. 103-158, 103rd Cong., 1st Sess. (1993), a House report leading up to the passage of Pub.L. No. 103-138, 107 Stat. 1379 (1994), providing:

> With regard to the systems development effort, the Committee is aware that the General Accounting Office and the Intertribal Monitoring Association are analyzing *trust fund management functions* with the purpose of identifying functions that could be handled by an outside entity and those that should be conducted in house by the Bureau. This analysis is to include all Bureau and Departmental functions that affect trust accounts *including trust resource management, billing and collections,* investments, and accounting and reporting.

See Pls.' Resp. at 14 (quoting H.R. Rep. No. 103-158, at 55 (1993)).

Plaintiffs suggest also that (H.R. Rep. No. 102-499, 102nd Cong., 2d. Sess. 1992) demonstrates congres-

sional awareness of and overall discontent with "the United States' failure to lease lands, to reissue leases, to obtain fair market value, to collect delinquent rents, and to collect interest on late rental payment as part of the financial management problems." Pls.' Resp. at 14 (citing H.R. Rep. No. 102-499, at 9 (1992)); *see also* Tribes' Bases at 36.

The court notes that H.R. Rep. No. 102-499 is a general report that was compiled as part of the broader package of legislation aimed at reforming the government's discharge of its Indian trust responsibilities. *See* H.R.Rep. No. 102-499, at 1-5 (1992). This general report does not specifically deal with the adoption of any of the language in the Acts. Plaintiffs' citations to H.R. Rep. No. 102-499, therefore, do not assist the court in determining the meaning of the language contained in the Acts. However, H.R. Rep. No. 102-499 does provide general contextual support for plaintiffs' argument that the Acts are part of a broader remedial effort designed to alleviate long-standing problems associated with Indian trust management.

4. Effect of the Acts

Defendant urges that the Acts be viewed as waivers of sovereign immunity and their scope interpreted in a strictly limited manner. Def.'s Mot. at 7. Plaintiffs urge that the Acts be viewed as part of a remedial effort by Congress on behalf of tribes and interpreted broadly to support a wider congressional program to redress breaches of trust. Pl.'s Reply at 13-14. The court believes that the parties' general approaches, while relevant, are (particularly in the case of defendant's briefing) insufficiently focused on the most basic principle of statutory interpretation, the plain meaning

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of the statute. *See* 2A Singer, *supra*, § 46.01, at 113-129; *Consumer Prod. Safety Comm'n*, 447 U.S. at 108, 100 S. Ct. 2051 ("[T]he starting point for interpreting a statute is the language of the statute itself.").

With respect to the reach of the Acts back in time to preserve claims, the court finds that the words "the statute of limitations shall not commence to run on any claim . . . until the affected tribe . . . has been furnished with the accounting of such funds from which the beneficiary can determine whether there has been a loss . . ." operate to defer the accrual of "any claim . . . until . . . the accounting [is provided]." The court finds absolutely no ambiguity in the words of the statute. While both parties refer to the Acts as "tolling" enactments, the plain meaning of the text is that a claim within the scope of the Acts does not accrue until the accounting described in the Acts—that is, the accounting "concerning losses to or mismanagement of trust funds"—is provided.[8]

The statutory phrase "notwithstanding any other provision of law" appears to the court, as it does to plaintiffs, fully adequate to signal congressional awareness of the statutory framework, specifically 28 U.S.C. § 2501, and a corresponding determination on the part of Congress to preserve claims "notwithstanding" that

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[8] The distinction between "tolling" and "accrual" is evident in the definition of the words. "Accrue" is "[t]o come into existence as an enforceable claim or right." Black's Law Dictionary 21 (7th ed.1999). "The term accrue in the context of a cause of action means to arrive to commence," *id.*, whereas, a "tolling statute" is defined as a "law that interrupts the running of a statute of limitations in certain situations. . . ." *Id.* at 1495. *See generally*, 1 Calvin W. Corman, *Limitations on Actions* § 6.1, at 370-71 (1991) (Corman) *and* 2 Corman § 8.2, at 2-3.

framework. *See, e.g., Ridgway,* 454 U.S. at 73 n. 5, 102 S. Ct. 49.

This approach is consistent with judicial interpretation of a similarly lengthy period of claim preservation afforded by the Federal Tort Claims Act (FTCA), 28 U.S.C. § 2401 (1994),[9] notwithstanding the generally applicable statute of limitations contained in 28 U.S.C. § 2401 and the context of sovereign immunity. Under the FTCA, a tort claim against the United States is barred "unless action is begun within six months . . . of notice of a final denial of the claim by the agency to which it was presented." 28 U.S.C. § 2401(b). However, the "failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant *any time thereafter,* be deemed a final denial of the claim." 28 U.S.C. § 2675(a) (emphasis added). Most courts construing this statute have found that if no final determination is rendered by the agency within six months after a claim is filed, the option to bring suit remains with the claimant and there is no time limitation on when that claimant can bring suit. *See Conn v. United States,* 867 F.2d 916, 918-19 (6th Cir.1989), *Parker v. United States,* 935 F.2d 176, 178 (9th Cir. 1991) ("[Claimant] may institute his FTCA claim 'at any time.'").

In arriving at that interpretation, the courts looked first at the plain meaning of the statute. In *Conn v. United States,* for example, the court found that "section 2675(a) *expressly provides* that if the agency fails to finally dispose of the claim within six months after filing . . . [the claimant may exercise the option to

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[9] The court notes that this language was added to the statute in 1966 by Pub.L. No. 86-238, § 1(3), 73 Stat. 472 (July 18, 1966).

bring suit] *at any time* after the six months has expired and there has been no [final] denial." 867 F.2d 916, 920-21 (6th Cir. 1989) (emphasis added). The *Conn* court found that its interpretation did not place an unreasonable burden on administrative agencies. *Id.* at 921. "To avoid problems, an agency can simply deny the claim in such a manner as comports with [the applicable law] and thereby cause the six-month period to begin to run." *Id.* The power to begin the running of the FTCA limitation statute rests directly in the hands of the agency, similarly, defendant here has the sole power to begin the running of the statute by furnishing an accounting in accordance with the Acts.[10]

The Court of Appeals for the Third Circuit has observed that, given the remedial nature of the FTCA, it is " 'illogical, if not inequitable' to construe to the detriment of plaintiffs a provision designed to benefit them." *Pascale v. United States*, 998 F.2d 186, 190 (3rd Cir.1993) (quoting *Hannon v. United States Postal Service*, 701 F.Supp. 386, 389 (E.D.N.Y. 1988)). "It would be ironic if a provision designed to permit a claimant to pursue [its] remedy where the appropriate federal agency is dilatory . . . would, instead, defeat [its] claim where the government delays. . . ." *Id.* at 192. Given the remedial nature of the Acts, that observation appears applicable to this case as well.

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[10] In FTCA litigation in the Eighth Circuit, the government conceded that, in accordance with the plain meaning of the statute, there is no time limit for filing an FTCA action when an administrative claim is deemed to be denied under 28 U.S.C. § 2675(a) (1988) by virtue of an agency's failure to finally dispose of the claims within six months. *Taumby v. United States*, 919 F.2d 69, 70 (8th Cir. 1990) (on rehearing).

This approach is also consistent with Indian trust doctrine. When the government exercises some control over the management of Indian resources, a trust relationship is created. *See generally United States v. Mitchell*, 445 U.S. 535, 100 S. Ct. 1349, 63 L.Ed.2d 607 (1980) (*Mitchell I*) and 463 U.S. 206, 103 S. Ct. 2961, 77 L.Ed.2d 580 (1983) (*Mitchell II*); *Navajo Nation v. United States*, 263 F.3d 1325, 1329 (Fed. Cir. 2001); *White Mountain Apache Tribe v. United States*, 249 F.3d 1364, 1377 (Fed.Cir.2001). "[W]hen the United States is assigned control of the management of Indian resources and the duty to manage those resources, there is created a full fiduciary relationship with respect to that management, including all appurtenant trustee duties, obligations, and liabilities." *Navajo Nation*, 263 F.3d at 1329. This fiduciary duty exists "even when the government has less than total control of management of the resources. . . ." *Id.* In *White Mountain Apache Tribe*, the Federal Circuit applied the common law of trusts to hold that the United States had a trustee's duty to preserve the trust corpus, despite absence of specific statutory or regulatory language regarding a fiduciary relationship. 249 F.3d at 1378.

With respect to the types of claims preserved by the Acts, the court finds that the Acts cover claims both for monies received in trust by defendant and thereafter mismanaged and to "losses to" the trust, including monies that should have been received by the trust but were not received because of mismanagement of the Tribes' mineral and other assets. The court's conclusion is based on the language of the Acts. The Acts preserve claims "concerning losses to or mismanagement

of trust funds. . . ." Pub.L. No. 106-291, 114 Stat. 922, 939 (2000).

The use by Congress of the disjunctive "or" between the phrase "losses to" and the phrase "management of" the Tribes' trust funds indicates two different types of fiduciary breaches as to which Congress intended to preserve claims. It is obvious that "mismanagement of trust funds" is a particular type of fiduciary breach which would result in losses from the money already received in trust. In order to give meaning to the disjunctive phrase "losses to . . . trust funds," the court concludes that Congress thereby indicated its intent to include within the scope of the Acts claims for monies that should have been received by the trust but were not received because of defendant's breach of its trust duty to "make the trust property productive" with respect to the Tribes' mineral and other assets. *See Restatement (Second) of Trusts* § 181 (1992) ("[T]rustee is under a duty to the beneficiaries to use reasonable care and skill to make the trust property productive in a manner that is consistent with the fiduciary duties of caution and impartiality."); *see also id.* § 176 (1959) (duty to use reasonable care and skill to preserve the trust property); *Id.* § 174 (1959) (duty to exercise reasonable care and skill); *Id.* § 172 (1959) ("[T]rustee is under a duty to the beneficiary to keep and render clear and accurate accounts with respect to the administration of the trust"). If Congress had wished to limit the claims in the manner defendant suggests, it surely would have said "losses from mismanagement of trust funds" or some similar language more apt to that limited purpose.

Defendant's contrary view requires that the court focus exclusively on the words "mismanagement of trust

funds." That approach appears to the court to be in conflict with the rule of statutory constructions that all words in a statute are to be given meaning. *See* 2A Singer, *supra*, § 46.06, at 181-196 ("It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute.").

Although the court believes that the types of claims covered by the Acts can be discerned from the Acts' text itself, the court addresses briefly the policy arguments advanced by the parties.

In response to defendant's argument that the Acts should not be read to revive "stale" claims, the court notes that the apparent purpose of the Acts is to preserve claims otherwise stale. The court also notes that Congress has not shown itself at all unwilling to address and provide remedies for tribes even when the grievances to be redressed arose in the earliest days of this country, implicating problems of proof reaching back to the use and occupancy of aboriginal lands in centuries before Western explorations—matters potentially more complex and greatly more remote in time than the evidence in this case. *See, e.g.*, Pub.L. No. 104-198, 110 Stat. 2418 at 418 (September 18, 1996).

The court's interpretation does not mean, of course, that the phrase "losses to . . . trust funds" in the Acts encompasses every possible fiduciary breach that could be complained of. The phrase points to the amounts of money that should have been received in trust if the trustee had performed its duties. The plaintiffs continue to carry the burden of proof as to the existence of losses within the scope of the Acts.

III. Conclusion

For the foregoing reasons, defendant's motion is DENIED. Evidence of "losses to or mismanagement of trust funds" may be discovered and offered at trial with respect to the period 1946-1973.

IT IS SO ORDERED.

APPENDIX C

UNITED STATES COURT OF FEDERAL CLAIMS

Case Nos. 458a-79 L and 459a-79 L

THE SHOSHONE INDIAN TRIBE OF THE WIND RIVER RESERVATION, WYOMING, PLAINTIFF

v.

THE UNITED STATES

THE ARAPAHO INDIAN TRIBE OF THE WIND RIVER RESERVATION, WYOMING, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

Filed: June 21, 2002

ORDER

Further to a status conference held on the record on June 19, 2002, and the court's consideration of the motions before it, the court orders the following:

1. *Defendant's Motion to Correct Order* and *Defendant's Motion to Strike Testimony and Exhibits.* Further to a colloquy during the status conference, Dr. Tulk and Mr. Moritz will both be permitted to testify concerning volume estimates of sand and gravel taken from tribal land for the construction of the Boysen Dam and the value of such sand and gravel. The third bullet in Section 5, Exhibit B, on page 3 of the court's order of

June 13, 2002, is hereby AMENDED to permit Mr. Moritz to testify on volume and value with respect to the Boysen Dam and to permit him also to testify in rebuttal as an appraiser (not an economist) with respect to Dr. Tulk's expected testimony on opportunity costs.

2. *Tribes' Motion for Clarification and Amendment of the Court's June 14, 2002 Order.* The parties shall bring to trail eight copies of any exhibit they intend to move into evidence. The parties shall bring to trial four copies of oversized exhibits.

3. *Tribes' Objections to Defendant's Exhibits.* Objection sustained. The only marking or notation that may appear on any photograph contained in Defendant's Exhibit #142 is the name of the pit or site that is the subject of the photograph and/or the date the photograph was taken.

4. *Defendant's Objection to Proposed Topics of Plaintiffs' Testimony (Witnesses Hixon and Gold).* Consideration of objection deferred until time of testimony.

5. *Tribes' Revised Motion for Partial Summary Judgment Awarding Trust Earnings on Amounts That Should Have Been Deposited in Tribal Accounts and Memorandum in Support (Tribes' revised motion or Tribes' Rev. Mot.).* For the Following reasons, the Tribes' revised motion is DENIED.

The Tribes seek interest as damages relying primarily on 25 U.S.C. § 612, *United States v. Blackfeather*, 155 U.S. 180 (1894), *Peoria Tribe of Indians v. United States*, 390 U.S. 468 (1968), and *Minnesota Chippewa Tribe v. United States*, 11 Cl. Ct. 221 (1986). The Tribes argue that 25 U.S.C. § 612 obligates the government to deposit proceeds from the sale of the tribes' assets into

the tribes' trust account and that this specific statutory obligation distinguishes the Tribes' case from *Mitchell II* and its progeny.[1] *See* Tribes' Rev. Mot. at 2-4.

The court is unpersuaded that 25 U.S.C. § 612 provides the necessary "hook" which would remove this case from the general prohibition against awarding prejudgment interest against the United States under *Mitchell v. United States*, 664 F.2d 265 (Ct. Cl. 1981) (Mitchell II). In particular, the statute specifically refers to the accrual of interest on "proceeds from any judgment," thus expressly contemplating postjudgment interest but not prejudgment interest. 25 U.S.C. § 612.

In contrast to the legislation involved in *Peoria*, Section 612 focuses on the entitlement to interest *after* receipt of money.[2] Section 612 does not focus on, as *Peoria* does, a more particularly stated right to interest on proceeds obtained by particular defined actions re-

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[1] At the pretrial confernece on June 13, 2002, the court expresed its dissatisfaction with the Tribes' original briefing on the interest issue that was filed on June 6, 2002. In particular, the Tribes' original brief had failed to address *Mitchell II* and other conerns on the interest issue raised by the court at a status conference on February 5, 2002. The court gave plaintiff an opportunity to file a revised brief on June 18, 2002.

[2] The court believes *Blackfeather* and *Minnesota Chippewa* are also distinguishable because those cases dealt with a specific asset, whereas Section 612 deals generally with "any receipts." The court has also looked closely at *Pueblo of San Ildefonso v. United States*, 35 Fed. Cl. 777 (1996) and *Shoshone Tribe of Indians of the Wind River Reservation v. United States*, 299 U.S. 476 (1937). *Pueblo* offers little guidance because the court did not interpret the language of the statute at issue. *Shoshone* also appears inapposite, not only because it treats a unique set of facts, but also because it predates the articulation of damages for breach of trust in *Mitchell II*.

quired to be performed by the United States. Section 612 does not state, as the legislation involved in *Peoria* does, that the United States shall sell land and then invest, nor does it appear to impose such a responsibility by any similar phrasing.

6. *Takings.* The court also suggested a probable resolution of the takings question, but did not rule on that issue. The parties may include arguments on the takings issue in their post-trial briefing, if they so choose. For the guidance of the parties in preparation of evidence and issues for trial, the court discusses its position, as presently advised, on the takings issue.

Under *Short v. United States*, 50 F.3d 994 (Fed. Cir. 1995), a plaintiff cannot recover under a takings claim if the court determines there was a breach of trust by the government for unauthorized behavior. In *Short*, the government managed timbering activities on the Hoopa Valley Reservation and made per capita payments from the proceeds of such activities exclusively to members of the Hoopa Valley Tribe, but not to other Indians of the Reservation. *Short*, 50 F.3d at 996. The government was found liable for breach of trust for distributing portions of the Hoopa Valley Reservation Trust Fund only to members of Hoopa Valley.

Plaintiffs also argued that, as an alternative theory of recovery, their exclusion from distributions of Hoopa Valley Reservation trust monies constituted a taking for which just compensation was required. *Short*, 50 F.3d at 1000. The court pointed out that a takings claim is premised upon authorized action, either expressly or by necessary implication by some valid enactment of Congress. *Id.* The court then characterized the exclusive payments as "unauthorized" and "illegal." *Id.* The court concluded:

> The plaintiffs are entitled to the damages awarded by the Court of Federal Claims because the Secretary failed to operate within the framework established by Congress for the administration of reservation revenues. Thus, the factual predicate for the plaintiffs' Fifth Amendment argument is contradicted. . . .

Id. The Federal Circuit determined that a finding that the government had breached its trust responsibilities by unauthorized exclusive distributions necessarily precluded a finding that the government had taken their property interest because the requisite element of authorized action was missing.[3]

Because the facts of *Short* are so closely analogous to the facts of this case and because the case has not been criticized by subsequent Supreme Court or Federal Circuit law, the court believes its holding will strongly guide the court's ruling in the takings questions in our case.

7. *Plaintiffs' Opposition to Defendant's Motion to Correct Order (Plaintiffs' Opposition).* Plaintiffs' Opposition was forwarded to the court unfiled because it did not contain Proof of Service. It appeared in the status conference that defendant has received a faxed copy of Plaintiffs' Opposition. The Clerk of the Court is directed to FILE Plaintiffs' Opposition to Defendant's Motion to Correct Order despite the deficiency.

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[3] The court recognized that the scope of the concept of "authorized" actions for takings purposes has been affected by *Del-Rio Drilling Programs Inc. v. United States*, 146 F.3d 1358 (Fed. Cir. 1998), but does not conclude, in the light of currently existing precedents, that *Short* has ceased to be authoritative in the breach of trust context.

IT IS SO ORDERED.

EMILY C. HEWITT
Judge

APPENDIX D

UNITED STATES COURT OF FEDERAL CLAIMS

Case Nos. 458a-79 L and 459a-79 L

THE SHOSHONE INDIAN TRIBE OF
THE WIND RIVER RESERVATION, WYOMING,
PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

THE ARAPAHO INDIAN TRIBE OF THE
WIND RIVER RESERVATION, WYOMING, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

Filed: Oct. 4, 2002

ORDER

The parties in Case Nos. 458a-79 L and 459a-79 L have filed with the court their Settlement Agreement, which the court approves. All issues in these cases, except for two issues specified below which the parties reserve for appeal, have been fully and finally concluded by way of compromise and settlement.

With respect to the two issues that remain before the court pursuant to the Settlement Agreement, the court hereby directs the Clerk of the Court to ENTER JUDGMENT as follows:

(1) Pursuant to the court's Opinion and Order, filed November 30, 2001, judgment for plaintiffs on the issue of statute of limitations.

(2) Pursuant to paragraph 5 of the court's Opinion and Order, filed June 21, 2002, judgment for defendant on the issue of interest.

Each party shall bear its own costs, expenses, and fees.

IT IS SO ORDERED.

EMILY C. HEWITT
Judge

APPENDIX E

UNITED STATES COURT OF FEDERAL CLAIMS

Case Nos. 458a-79 L and 459a-79 L

THE SHOSHONE INDIAN TRIBE OF
THE WIND RIVER RESERVATION, WYOMING,
PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

THE ARAPAHO INDIAN TRIBE OF THE
WIND RIVER RESERVATION, WYOMING, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

Filed: Oct. 10, 2002

JUDGMENT

Pursuant to the court's Order, filed October 4, 2002,

IT IS ORDERED AND ADJUDGED this date, pursuant to Rule 58, that:

(1) Pursuant to the court's Opinion and Order, filed November 30, 2001, judgment is for plaintiffs on the issue of statute of limitations.

(2) Pursuant to paragraph 5 of the court's Opinion and Order, filed June 21, 2002, judgment is for defendant on the issue of interest.

Each party shall bear its own costs, expenses, and fees.

Margaret M. Earnest
Clerk of the Court

October 10, 2002

By: _____/S/_____
Deputy Clerk

Note: As to appeal, 60 days from this date, see RCFC 58.1, re number of copies and listing of all plaintiffs. Filing fee is $105.00.

APPENDIX F

UNITED STATES COURT OF FEDERAL CLAIMS

Case Nos. 458a-79 L and 459a-79 L

THE SHOSHONE INDIAN TRIBE OF
THE WIND RIVER RESERVATION, WYOMING,
PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

THE ARAPAHO INDIAN TRIBE OF THE
WIND RIVER RESERVATION, WYOMING, PLAINTIFF

v.

THE UNITED STATES, DEFENDANT

Filed: Oct. 1, 2002

Judge: EMILY HEWITT

SETTLEMENT AGREEMENT

WHEREAS, the Eastern Shoshone Tribe of the Wind River Reservation and the Northern Arapaho Tribe of the Wind River Reservation are federally recognized Indian Tribes, sharing the Wind River Reservation; and

WHEREAS, the United States holds legal title to the real property which constitutes the Wind River Reservation ("Reservation"), including legal title to mineral

rights, in trust, upon which the plaintiff hold beneficial interests; and

WHEREAS, the Tribes have asserted claims pursuant to 28 U.S.C. §§ 1491 and 1505 against the Untied States filed on October 10, 1979 in Docket Nos. 458-79 L and 459-79 L. On November 8, 1979, the two actions of the Tribes were consolidated; and

WHEREAS, all plaintiffs' claims regarding sand and gravel on the Reservation, except for oil and gas, were assigned to sub-dockets Nos. 458a-79 L and 459a-79 L by Order of June 13, 2001, paragraph 1 ("Sub-dockets"); and

WHEREAS, in these Sub-dockets, plaintiffs have alleged for the period 1946 through 2000:

a. The United States failed to maximize the Tribes' best economic interests when permitting sand and gravel;

b. The United States failed to assess and collect required rental payments for sand and gravel;

c. The United States failed to require timely payment for sand and gravel removed or extracted;

d. The United States failed to include protections in permits, to monitor the permits for violations, and to take action with respect to those violations;

e. The United States breached its trust duty to prevent trespass of the tribes' minerals;

f. The United States is directly liable for mineral trespass;

g. The United States is liable for a Fifth Amendment taking of sand and gravel for public purposes without compensation; and

h. The United States failed to provide for proper reclamation of the sand and gravel pits; and

WHEREAS, the parties to the above-captioned action desire to settle and resolve all issues in the Sub-dockets without admitting or conceding the truth, liability, or legal effect of or for any of the matters asserted in the complaints therein; and

WHEREAS, the parties wish to preserve for possible appeal two issues only, namely;

a. The defendant wishes to preserve for possible appeal the issue of statute of limitations more fully set forth in the Opinion and Order of the Court in the Sub-dockets of November 30, 2001; and

b. The plaintiffs wish to preserve for possible appeal the issue of interest as set forth in Plaintiffs' Motion for Partial Summary Judgment and as further set forth in paragraph 5 of the Order of the Court in the Sub-dockets of June 21, 2002.

NOW THEREFORE, it is stipulated and agreed by and between the parties, through the undersigned counsel as follows:

1. Plaintiffs and defendant have engaged in good faith settlement negotiations to avoid further litigation in the Sub-dockets, except for the possible appeal of two issues only as delineated in paragraph 4 below.

2. This Agreement is the result of compromise and settlement and shall not constitute or be construed as an admission, or be utilized or admissible as precedent, evidence or argument in any other proceeding, except as may be necessary to ensure compliance with its terms or to carry out the terms hereof. However, the United States or plaintiffs may utilize this Agreement to document the fact that plaintiffs' claims were disposed of pursuant to the terms incorporated herein.

3. By way of compromise and settlement, the United States shall pay to plaintiffs the sum of Two Million Seven Hundred and Fifty Thousand Dollars ($2.75 Million), as full and final payment of all claims which plaintiffs have asserted or could have asserted in the Sub-dockets; except as provided in paragraph 4. This compromise and settlement is inclusive of all claims for damages, expenses, costs, interest, attorneys' fees, and any other fees of any kind related to plaintiffs' claims settled in these Sub-dockets. It is agreed by the parties that this compromise and settlement shall cover all mineral issues except oil and gas claims of any kind on the Reservation, except as provided in paragraph 4 below.

4. Upon approval of the Court, a final judgment shall be entered in the Sub-dockets on:

a. The issue of the statute of limitations as set forth in the Opinion and Order of the Court in the Sub-dockets of November 30, 2001. Defendant may appeal this issue only; and

b. The denial of Plaintiffs' Motion for Partial Summary Judgment on the issue of interest as set forth in paragraph 5 of the Order of the

Court in the Sub-dockets of June 21, 2002. Plaintiffs may appeal this issue only.

5. Appeal on any issue in the Sub-dockets not enunciated in paragraph 4 is hereby waived. The parties agree that paragraph 4 enunciates the only issues remaining in the Sub-dockets not covered by the compromise and settlement in paragraph 3.

6. If plaintiffs are successful in the final judicial determination of the statute of limitations issue as defined in paragraph 4(a), defendant will pay to plaintiffs as a compromise and settlement the sum of Fifty Thousand Dollars ($50 Thousand) as full and final payment of all claims which plaintiffs have asserted or could have asserted in the Sub-dockets for the period proceeding October 10, 1973. If plaintiffs are not successful in the final judicial determination of the statute of limitations issue as defined in paragraph 4(a), defendant will pay nothing to plaintiffs on this issue. This compromise and settlement is inclusive of all claims for damages, expenses, costs, interest, attorneys' fees, and any other fees of any kind related to plaintiffs' claims settled in these Sub-dockets for the period specified.

7. If plaintiffs are successful in the final judicial determination of the issue as defined in paragraph 4(b), defendant will pay to plaintiffs as a compromise and settlement the sum of Five Hundred Thousand Dollars ($500 Thousand) as full and final payment of all claims which plaintiffs have asserted or could have asserted in the Sub-dockets on the issue as defined in paragraph 4(b). If plaintiffs are not successful in the final judicial determination of the issue as defined in paragraph 4(b), defendant will pay nothing to plaintiffs on this issue. This compromise and settlement is inclusive of all claims for damages, expenses, costs, interest, attorneys'

fees, and any other fees of any kind related to plaintiffs' claims settled in these Sub-dockets.

8. The compromise and settlement and the entry of judgment provided herein shall finally dispose of all rights, claims or demands that plaintiffs have asserted or could have asserted against defendant within the scope of the complaint filed in this case with respect to all minerals except for oil and gas, and except for allegation concerning tribal trust funds. This compromise and settlement is inclusive of all claims for damages, expenses, costs, interest, attorneys fees, and any other fees of any kind related to plaintiffs' claims settled in these Sub-dockets. Plaintiffs shall be barred thereby from asserting any such rights, claims or demands against the United States in any future actions.

9. The execution of this Settlement Agreement by the attorneys of record shall denote each has authority to execute this Settlement Agreement on behalf of the party they represent.

10. The parties agree to execute and file with the Court a joint motion or motions for final judgment pursuant to this stipulation, if necessary, and to execute such additional documents as may be necessary to consummate this settlement.

11. The foregoing Settlement Agreement constitutes the full and complete agreement of the parties. No additional, supplemental, or ancillary agreement exists outside of the foregoing stipulations.

Respectfully submitted,

Dated: 5 Aug. 2002

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APPENDIX G

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

03-5036, -5037

THE SHOSHONE INDIAN TRIBE OF THE WIND RIVER RESERVATION, PLAINTIFF/CROSS-APPELLANT

AND

THE ARAPAHO INDIAN TRIBE OF THE WIND RIVER RESERVATION, PLAINTIFF/CROSS-APPELLANT

v.

UNITED STATES, DEFENDANT-APPELLANT

ORDER

A combined petition for panel rehearing and for rehearing en banc having been filed by the APPELLANT, and a response thereto having been invited by the court and filed by the CROSS-APPELLANTS, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on September 2, 2004.

FOR THE COURT,

Jan Horbaly
Clerk

Dated: August 26, 2004

cc: Robert H. Oakley
Steven D. Gordon, Richard M. Berley
Jeanne S. Whiteing, Melody L. McCoyp

SHOSHONE INDIAN TRIBE V US, 03-5036, -5037 (CFC - 79-CV-4581)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

03-5036, -5037

THE SHOSHONE INDIAN TRIBE OF THE WIND RIVER RESERVATION, PLAINTIFF/CROSS-APPELLANT

AND

THE ARAPAHO INDIAN TRIBE OF THE WIND RIVER RESERVATION, PLAINTIFF/CROSS-APPELLANT

v.

UNITED STATES, DEFENDANT-APPELLANT

ORDER

Before RADER, Circuit Judge, ARCHER, Senior Circuit Judge, and GAJARSA, Circuit Judge.

A petition for rehearing having been filed by the CROSS-APPELLANTS, and a response thereto having been invited by the court and filed by the APPELLANT,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, DENIED.

The mandate of the court will issue on September 2, 2004.

FOR THE COURT,

Jan Horbaly
Clerk

Dated: August 26, 2004

cc: Robert H. Oakley
Steven D. Gordon, Richard M. Berley
Jeanne S. Whiteing, Melody L. McCoy

SHOSHONE INDIAN TRIBE V US, 03-5036, -5037 (CFC - 79-CV-4581)

Note: Pursuant to Fed. Cir. R. 47.6, this order is not citable as precedent. It is a public record.

(3)

No. 04-929

Supreme Court, U.S.
FILED
MAR 9 2005
OFFICE OF THE CLERK

In The
Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

SHOSHONE TRIBE OF THE WIND RIVER RESERVATION AND THE ARAPAHO TRIBE OF THE WIND RIVER RESERVATION

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

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QUESTIONS PRESENTED

1. Whether provisions contained in appropriations Acts for the Department of Interior since 1990: (a) preserve claims relating to losses to or mismanagement of Indian trust funds which might otherwise have expired prior to passage of the Acts; or (b) cover claims that the Government failed to collect revenues due under tribal mineral agreements and deposit them into the relevant tribal trust accounts.

2. Whether the respondent Tribes can recover, as an element of damages, interest on funds that the United States ought to have collected on their behalf but that were not deposited into tribal trust accounts.

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INTRODUCTION

Respondents Shoshone Tribe and Arapaho Tribe (collectively, the "Tribes") respectfully request that this Court deny the Government's petition for writ of certiorari seeking review of certain aspects of the Federal Circuit's opinion in this case.[1]

STATEMENT OF THE CASE

Although the Government's statement of the case and the decisions below is generally accurate, its summary of the Federal Circuit's decision is incorrect in one important respect. The Government wrongly asserts that the court held that the Tribes were entitled to prejudgment interest. To the contrary, the court carefully explained that "[t]his decision . . . does not award pre-judgment interest, but rather awards interest as a part of the damages sustained by the Government's breach [of fiduciary duty]." Pet. App. at 23a n.7.

[1] The Tribes have filed their own petition for a writ of certiorari seeking review of the Federal Circuit's decision insofar as it limits the appropriations Acts to claims alleging failures to collect payments due under Tribal contracts, deposit collected monies into interest-bearing accounts, or assess penalties against lessees for late payments. *See Eastern Shoshone Tribe of the Wind River Reservation, et al. v. United States*, petition for cert. pending, No. 04-731 (filed Nov. 24, 2004).

REASONS FOR DENYING THE WRIT

I. The Court of Appeals Correctly Ruled that a Series of Interior Appropriations Acts Preserve Indian Claims Until an Accounting is Provided, and that the Acts Are Not Limited to Claims Alleging Government Mishandling of Monies After Deposit into a Trust Account.

The court of appeals correctly ruled that a series of appropriations acts for the Department of the Interior ("Acts"), the most recent of which is the Department of the Interior and Related Agencies Appropriations Act of 2004, Pub. L. No. 108-108, 117 Stat. 1241, defer the commencement of the statute of limitations on Indian claims concerning losses to or mismanagement of trust funds until the affected tribe or individual Indian has been furnished with an adequate accounting. Consequently, where no such accounting has yet been provided, the Acts preserve all breach of trust claims within their purview, including those as to which the six-year limitations period established by 28 U.S.C. § 2501 otherwise might have expired. Further, the court correctly ruled that the Acts were not limited to claims for mishandling of monies contained in Tribal trust accounts, but also cover claims based on the Government's wrongful failure to collect and deposit money owed to the Tribes under mineral leases.

A. The Acts Defer Commencement of the Statute of Limitations on Indian Breach of Trust Claims and Do Not Simply Toll the Statute of Limitations.

The Government takes the untenable position that the Acts should be interpreted as mere "tolling" provisions for limitations purposes. Both the Court of Federal Claims

("CFC") and the Federal Circuit rejected this contention, and concluded that the Acts are instead "accrual" provisions that defer commencement of the limitations period for Indian breach of trust claims. This conclusion is compelled by the plain language of the Acts:

> [N]otwithstanding any other provision of law, the statute of limitations shall not commence to run on any claim, including any claim in litigation pending on the date of the enactment of this Act, concerning losses to or mismanagement of trust funds, until the affected tribe or individual Indian has been furnished with an accounting of such funds from which the beneficiary can determine whether there has been a loss.[2]

The court of appeals, like the CFC, saw "no ambiguity in the language used by Congress," and held that the "clear intent of the Act is that the statute will not begin to run on a tribe's claims until an accounting is completed." Pet. App. 13a.[3] In a straightforward analysis, the court of appeals held, first, that "notwithstanding any other provision of law," connotes a legislative intent to displace any other provision of law that is contrary to the Acts, including the otherwise applicable statute of limitations. Pet. App. 12a. Second, "shall not commence to run" unambiguously indicates that Congress wants commencement of the statute of limitations deferred until an accounting is provided. Pet. App. 13a. This analysis is unimpeachable.

---

[2] *See* Pet. at 2 & n.1.

[3] The Government acknowledges, as it must, that Congress can expand limitations periods for claims against the Government, make such changes retroactive, and revive lapsed claims. Pet. 13-14, n.6. Thus, the only issue here is whether Congress intended to do so.

Nonetheless, the Government continues to argue that the Acts are mere tolling provisions which do not revive "stale" claims for which the limitations period may have already expired when the first of the Acts was passed. But this argument assumes that the statute of limitations trumps the Acts in derogation of the explicit congressional mandate that the Acts shall govern "notwithstanding any other provision of law."

The Acts cannot reasonably be construed as tolling provisions. "Toll" means "to stop the running of" a statute of limitations, Black's Law Dictionary (8th ed. 2004), and relates to limitations periods that have already commenced. In the Acts, Congress eschewed the language of interruption by providing that the statute of limitations "shall not *commence* to run." Congress announced, clearly and repeatedly, that until the Government as trustee furnishes a proper accounting to its Indian wards, it will have no statute of limitations defense to claims within the Acts' purview. The court of appeals correctly reasoned that Congress's decision to use "shall not commence to run" instead of "tolls" was determinative. Pet. App. 12a-13a, citing *INS v. Cardoza-Fonseca*, 480 U.S. 421, 433 n.12, 436 (1987).

The Government argues that the phrase "shall not commence to run" indicates that Congress did not intend the Acts to apply retroactively. Pet. at 16 n.7. This argument fails for multiple reasons. Even were "shall" to be construed as a future tense verb, as the Government suggests, it would refer not to future *claims* but to the future *furnishing of an accounting* which will commence the running of the statute of limitations. In the context of the Acts, however, "shall" is not used as a future tense verb, but instead denotes a duty or a requirement. *See*

Black's Law Dictionary (8th ed. 2004). "Shall not," as used in the Acts, is a statutory command.

More fundamentally, the Government's argument founders upon the language of the Acts, which covers "any claim" without limitation and specifically includes "*any claim in litigation pending on the date of the enactment of this Act.*" The Acts' application to pending litigation, such as the Tribes' claims here, necessarily is retroactive. The Government contends that this language merely extends the Acts' "tolling effect" to filed claims that were not time-barred when filed, but this construction is nonsensical and would render the phrase superfluous. The six-year statute of limitations applicable to claims against the United States is measured as of the date the complaint or petition is filed. 28 U.S.C. § 2501. There is no need to further "toll" a claim that was timely when it was filed. Rather, the purpose of this language is to make clear that the Acts apply to all pending claims regardless of whether they would otherwise be considered timely.[4]

The court of appeals also noted that the Acts' approach to limitations is consistent with general trust principles, under which "it is . . . common for the statute of limitations to not commence to run against the beneficiaries until a final accounting has occurred that establishes the deficit of the trust." Pet. App. 15a, citing 76 *Am.Jur.2d*

[4] The Government contends that there would have been no need to add the proviso for pending claims in 1993 if the original statutory language covering "all claims" had been intended to be retroactive. Absent this clarification, however, there might have been some question as to whether the Acts applied to pending actions. *See United States v. St. Louis, S.F. & T. Ry. Co.*, 270 U.S. 1, 4 (1926) (refusing to assume that Congress intended an amendment to a statute of limitations to apply to claims on which suits were then pending).

Trusts § 440 (2000); *McDonald v. First Nat'l Bank of Boston*, 968 F.Supp. 9, 14 (D.Mass.1997).[5] In addition, this approach comports with "simple logic – how can a beneficiary be aware of any claims unless and until an accounting has been rendered?" Pet. App. 13a-14a. The Government argues that the provision of an accounting is not "an invariable prerequisite" to the commencement of the limitations period in breach of trust actions and that sometimes the beneficiary knew or should have known of the breach before an accounting was rendered. Pet. 18-19. The short answer to this argument is that Congress explicitly adopted a categorical approach in the Acts. It made clear that, for any claim concerning losses to or mismanagement of Indian trust funds, an accounting from which the beneficiary can determine whether there has been a loss *is* required before the limitations period will commence.[6]

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[5] Thus, even apart from the Acts, the statute of limitations may not have commenced running on the Tribes' claims under the common law of trusts.

[6] The Government complains that this limitations rule may revive many old claims and substantially increase the potential liability and litigation burdens of the United States. Pet. 9-11. This, however, is a policy choice that Congress has made to honor its legal and moral obligations to Native Americans. If the Government wishes to avoid continuing liability for historic trust fund mismanagement, it can trigger commencement of the limitations period on Indian claims at any time by furnishing an accounting to the affected tribes or individuals. At this juncture, some 14 years after passage of the first of the Acts, the Government's continued susceptibility to old claims is attributable to its ongoing dereliction of trust responsibility by failing to provide accountings.

B. The Acts Are Not Limited to Claims for Government Mishandling of Monies After Deposit Into a Trust Account.

The Government also presses the argument, unanimously rejected below, that the Acts apply only to claims for mishandling of monies actually contained in Indian trust accounts. The difficulty with this position is that the Acts cover not only claims for "mismanagement of trust funds" but also any claims concerning "losses to" trust funds. Both lower courts rejected the Government's construction because it effectively reads the provision for "losses to" trust funds out of the Acts, making it entirely redundant. This interpretation conflicts with accepted rules of statutory construction requiring that meaning be attributed to all words in the Acts, if possible. Pet. App. 17a, 51a-53a.

Based on Congress' use of the disjunctive "or" between the two phrases "losses to" and "management of" trust funds, both lower courts reasoned that the Acts are intended to preserve claims for two different types of fiduciary breaches. To avoid redundancy, "losses to" trust funds must encompass something beyond mismanagement of trust funds after their collection, *i.e.*, it must apply to certain breaches of trust occurring before funds are collected and deposited into trust accounts. The CFC concluded that Congress intended "losses to" trust funds to include claims for monies not received because the Government breached its fiduciary duty to "make the trust property productive." Pet. App. 52a. The court of appeals took a narrower view, construing "losses to" trust funds to cover losses resulting from the Government failure to timely collect amounts due and owing to the Tribes under

their mineral leases, which it characterizes as accounts receivable. Pet. App. 18a-21a.[7]

The central flaw in the Government's argument that the Acts should be limited to claims for mishandling of collected funds is that it does not and cannot explain why the provision for "losses to" trust funds was included in the Acts. The Government contends, in essence, that Congress repeatedly wasted its breath by covering claims for "losses to" trust funds in addition to claims for "mismanagement of" trust funds.

There are other flaws in the Government's argument, such as contending that its failure to collect and deposit monies owed under the Tribes' mineral leases is not properly regarded as a "loss" to the tribal trust accounts. The Government regularly takes the opposite position when it suffers this sort of "loss," for example when there is a failure to pay federal self-employment or withholding taxes. *See United States v. Twieg*, 238 F.3d 930, 932 (7th Cir. 2001) (failure to pay taxes results in loss to Government); *Winter v. United States*, 196 F.3d 339, 344 (2d Cir. 1999) (same). Further, the Government itself defines Indian trust funds as "money *derived from the sale or use of trust lands, restricted fee lands, or trust resources* or other money that the Secretary must accept into trust." 25 C.F.R. § 115.002 (emphasis added). Accordingly, the conclusion is inescapable that the Government's failure to collect or deposit monies owed to the Tribes results in a "loss" to the tribal trust funds.

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[7] The Tribes believe that the CFC's broader construction is correct. This is the subject of the Tribes' pending petition for certiorari. *See* n.1, *supra*.

Moreover, the ultimate question is what Congress intended when it drafted the Acts to cover claims for "losses to" trust funds. Significantly, the legislative history of the appropriations legislation containing the 1994 version of the Acts demonstrates that Congress viewed "trust resource management" and "billings and collections" as "trust fund management functions" that directly affect Indian trust accounts:

> With regard to the systems development effort, the Committee is aware that the General Accounting Office and the Intertribal Monitoring Association are analyzing *trust fund management functions* with the purpose of identifying functions that could be handled by an outside entity and those that should be conducted in house by the Bureau. This analysis is to include *all Bureau and Departmental functions that affect the trust accounts including trust resource management, billings and collections, investments, and accounting and reporting.*

H.R. Rep. No. 103-158, at 55 (1993) (emphasis added). Thus, when Congress passed the Acts, it directly linked resource management and billings and collections to the resulting funds in Indian trust accounts. In light of this linkage, the Government's argument that the Acts do not cover claims for wrongful failure to collect or deposit monies owed the Tribes is entirely unpersuasive.

Finally, the Government argues that its failure to timely collect and deposit amounts due the Tribes is outside the ambit of the Acts because it is not the sort of loss that would be uncovered by an accounting. According to the Government, the only loss that an accounting would reveal is a dissipation of funds that at one time were in a

tribal trust account. In making this argument, the Government takes a myopic view of an accounting and how it is used by a beneficiary to determine whether or not there has been a loss. As the court of appeals explained, a clear and accurate accounting by a trustee will show what he has received, what he has expended, what gains have accrued, and what losses have resulted. The beneficiary then can compare the results of this accounting with pertinent mineral leases to ascertain what income was required to be received by the Government but was either not received or was received late. Pet. App. at 21a.[8]

The Government's suggestion that its narrow definition of an accounting is reinforced by the American Indian Trust Fund Management Reform Act of 1994 is incorrect. To the contrary, that Act requires the Secretary of the Interior to provide comprehensive, meaningful accountings to Indian tribes and individuals that will enable them to determine whether there has been either mismanagement of, or losses to, their trust accounts. It mandates quarterly

[8] Even if one adopts the Government's narrow definition of an accounting, there is no basis for limiting the sorts of claims covered by the Acts based on the utility of an accounting in proving such claims. In fact, it is impossible for a beneficiary to establish *any* claim for mismanagement of, or loss to, trust funds without having an accounting of money held in the trust account as a baseline for calculating damages. At the same time, an accounting of money held in the tribal accounts will seldom be sufficient by itself to prove either sort of claim – resort must be had to other evidence to establish whether there has been a breach of duty and, if so, what the amount of damages are. For example, an accounting of money held in the account will not reveal whether trust funds have been mismanaged after receipt by making expenditures for improper purposes or failing to properly invest the funds and obtain an appropriate return. Additional information is needed to complete the picture, just as in the case of claims for losses to trust funds based on failures to collect accounts receivable.

statements for Indian trust accounts that identify (1) the *source, type, and status* of the funds; (2) the beginning balance; (3) the gains and losses; (4) receipts and disbursements; and (5) the ending balance. 25 U.S.C. § 4011(b) (emphasis added). Moreover, it mandates "integration of . . . trust funds accounting, and asset management systems," 25 U.S.C. § 4043(c)(4), so that Indian landholders are provided with "accurate and timely reports on a periodic basis that cover all transactions related to leases of Indian resources." *Id. at* § 4043(c)(4)(B)(ii). In enacting this legislation, Congress *criticized* the Government for undertaking trust fund reform piecemeal, stating that what was necessary was a "comprehensive strategic plan for all phases of the trust management business cycle, including . . . collecting, accounting for, and investing trust fund revenues." H.R. Rep. 103-778, at 14-15 (1994). Contrary to the Government's contention, Congress's concerns in mandating trust fund accountings – and deferring Indian claims for breach of trust until receipt of such accountings – were *not* limited to care of collected funds.

II. The Court of Appeals Correctly Ruled that the Tribes Are Entitled to Recover as Damages the Interest that Should Have Been Earned on Monies the Government Failed to Collect for the Tribes' Resources.

The court of appeals correctly ruled that the Tribes are entitled to recover as damages the interest that should have been earned on payments the Government failed to collect for the Tribes' minerals in breach of its trust responsibilities. This issue is controlled by the Court's

decision in *Peoria Tribe of Indians v. United States*, 390 U.S. 468 (1968), which is directly on point.

A. The Government Has a Statutory Obligation to Invest and Earn Interest On All Revenues Derived From the Tribes' Natural Resources.

The Tribes' damages claim for lost interest is predicated upon the Government's statutory obligation to invest and earn interest on all revenues derived from the Tribes' natural resources. In 1947, Congress enacted special legislation mandating the establishment of trust funds for the benefit of the two Tribes. 25 U.S.C. §§ 611-13. Congress directed that, henceforth, "all future revenues and receipts derived from the Wind River Reservation under any and all laws" were to be divided between the two Tribes and placed in their respective trust accounts where interest was to accrue on the principal at an annual rate of 4%. 25 U.S.C. § 612. This provision explicitly obligates the Government to invest the proceeds received for the Tribes' mineral assets in interest-bearing trust accounts.[9]

Furthermore, the same obligation to invest and earn interest on all revenues derived from the Tribes' natural resources arises under several statutes that apply generally to Indian revenues held by the Government. 25 U.S.C. § 155 requires that "[a]ll miscellaneous revenues derived from Indian reservations . . . which are not required by

[9] The legislative history of Section 612 shows that Congress was well aware that the majority of funds to be placed in these interest-bearing trust accounts would be derived from sales of the Tribes' mineral resources. H.R. Rep. No. 80-172, at 2 (1947); S. Rep. No. 80-117, at 2 (1947).

existing law to be otherwise disposed of, shall be covered into the Treasury of the United States[.]" Several other statutes, 25 U.S.C. §§ 161a, 161b, and 162a, require the Government to earn a return on such trust funds.[10]

B. The Tribes Are Entitled to Recover Lost Interest As an Element of Damages.

Because the Government has an obligation to invest and earn interest on all revenues derived from the Tribes' natural resources, the full measure of the Tribes' damages for the Government's wrongful failure to collect funds for those resources includes the additional amount that should have been earned as interest on those funds. The Government's liability for such lost interest is firmly established by the decisions of this Court. *Peoria Tribe*, 390 U.S. at 471-73; *United States v. Blackfeather*, 155 U.S. 180, 192-93 (1894).

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[10] 25 U.S.C. § 161a provides that "[a]ll funds held in trust by the United States and carried in principal accounts on the books of the United States Treasury to the credit of Indian tribes shall be invested by the Secretary of the Treasury, at the request of the Secretary of the Interior, in public debt securities, . . . bearing interest at rates determined by the Secretary of the Treasury[.]"

Section 161b provides that all tribal funds included in the "Indian Money, proceeds of Labor" fund "shall, on and after July 1, 1930, be carried on the books of the Treasury Department in separate accounts for the respective tribes, and all such funds with account balances exceeding $500 shall bear simple interest at the rate of 4 per centum per annum from July 1, 1930."

Section 162a authorizes the Secretary of the Interior to withdraw Indian trust funds from the United States Treasury and to deposit them in banks where the United States "is not obligated by law to pay interest at higher rates than can be procured from the banks."

The issue presented here is not, as the Government contends, whether the Tribes are entitled to "prejudgment interest" on their claims. The Tribes do not seek an award of prejudgment interest *in addition to* damages; rather, they seek their lost investment return *as part of* their damages. "Prejudgment interest serves to compensate for the loss of use of money due as damages from the time the claim accrues until judgment is entered, thereby achieving full compensation for the injury those damages are intended to redress." *West Virginia v. United States*, 479 U.S. 305, 310 n.2 (1987). It is compensation for the money that the *plaintiff*, not the defendant, might have earned on his lost funds had the wrongful conduct not occurred. In contrast, this case involves a breach of fiduciary duty where the *defendant* had an obligation to invest the funds in issue and obtain a return on them for the benefit of the plaintiffs. The lost investment return is part and parcel of the defendant's breach of duty and of the plaintiffs' consequent damages.

The Court recognized this distinction in *Peoria Tribe*. In that case, a treaty required certain tribal lands to be sold at public auction by the Government and the proceeds either disbursed to the tribe or invested in bonds until the proceeds were paid over. The Government breached its obligations by selling tribal lands in private sales at depressed prices. The Court ruled that the tribe was entitled to recover not only the shortfall in the prices obtained for its lands, but also the lost investment earnings on those monies. The Court rejected the Government's contention that an award of interest to the tribe was precluded by the general rule that the United States is not liable for prejudgment interest. It explained that "[t]he issue, rather, concerns the measure of damages for the

treaty's violation in the light of the Government's obligations under that treaty." 390 U.S. at 471.

More specifically, the Court framed the issue as "whether the obligation of the United States to invest unpaid proceeds [*i.e.* proceeds from land sales not yet paid over to the plaintiff tribe] applies to proceeds which, by virtue of the United States' violation of the treaty, were never in fact received." *Id.* Answering this question in the affirmative, the Court held the Government liable for its failure to invest the proceeds that would have been received had it not violated the treaty. *Id.* at 473. The same result obtains here. Because the Government has a duty to invest all revenues received for the Tribes' assets, it is liable not only for the lost revenues it failed to collect for the Tribes' minerals, but also for the interest that should have been earned on those revenues.

Since the Tribes seek lost interest as damages for the Government's breach of duties imposed by statutes and regulations, the Tucker Act, 28 U.S.C. § 1491, and the Indian Tucker Act, 28 U.S.C. § 1505, provide the United States' consent to suit if the statutes or regulations at issue "'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained.'" *United States v. Mitchell*, 463 U.S. 206, 216-17 (1983) ("*Mitchell II*") (*quoting United States v. Testan*, 424 U.S. 392, 400 (1976)).[11] A source of substantive law is

[11] In contrast, the sovereign immunity cases cited by the Government addressed the issue of "prejudgment interest" rather than interest as a component of damages. Moreover, those cases did not involve any specific requirement that the Government pay interest. In *Library of Congress v. Shaw*, 478 U.S. 310 (1986), the issue was whether language in Title VII of the Civil Rights Act of 1964 providing that "the United States shall be liable for costs the same as a private person" was

(Continued on following page)

money-mandating if, either expressly or by implication, it entrusts the Government with sufficient "control" or "supervision" over Indian property to justify a conclusion that Congress intended to impose an enforceable fiduciary obligation on the part of the Government in managing that property. *Id.* at 225. This "fair inference" rule requires simply that the relevant statute or regulation "be reasonably amenable to the reading that it mandates a right of recovery in damages." *United States v. White Mountain Apache Tribe*, 537 U.S. 465, 473 (2003).

In this case, the applicable tribal investment statutes impose an explicit duty on the Government to invest all revenues and receipts from the Reservation and to pay interest on those funds. 25 U.S.C. § 612;[12] *see also* 25

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sufficient to waive the Government's sovereign immunity against paying interest on an attorneys' fee award. In *United States v. Thayer-West Point Hotel Co.*, 329 U.S. 585 (1947), the issue was whether a statute and lease providing for "just compensation" in the event the Government took over a hotel was sufficient to waive the Government's sovereign immunity against paying interest.

[12] The CFC erroneously read 25 U.S.C. § 612 to contemplate post-judgment interest but not prejudgment interest because the statute specifically mentions the former but not the latter. The provision covering the "proceeds from any judgment" was not part of the original 1947 statute but was added some eleven years later in 1958. Pub. L. No. 85-610, 72 Stat. 541, 626 (1958). The 1958 amendment provided a mechanism for management and distribution of judgment funds, obviating the need for specific legislation each time a judgment was received. From the outset, the statute has obliged the Government to invest all revenues and receipts derived from the Reservation for the Tribes' benefit, thereby making the loss of interest an element of damages for any tribal claim accruing thereafter and so obviating any need for prejudgment interest on such claims. The 1958 amendment ensured that the Tribes also would receive post-judgment interest on all judgments they obtained.

U.S.C. §§ 155, 161a, 161b, 162a. The statutory language is mandatory: money "shall be" deposited and interest "shall accrue." There can be no dispute as to Congressional intent to impose an enforceable fiduciary duty on the Government with respect to the management of revenues derived from the Tribes' natural resources. Thus, when the Government breaches that duty, it is liable to the Tribes for the resulting damages.

The Government struggles in vain to distinguish this case from *Peoria Tribe*. First, it makes the red herring argument that the court of appeals erred in concluding that the United States has a legal duty to collect funds owed the Tribes from the sale of their natural resources. The circuit court made no such ruling. It simply noted that the Government often has a duty, by contract or pursuant to 25 C.F.R. § 211.40, to collect lease proceeds. Whether, in this case, the Government had a duty to collect funds for the Tribes' sand and gravel resources was not an issue on appeal because the parties had settled that claim for $2.75 million and preserved only the issue whether the Tribes were entitled to additional damages for lost interest on the uncollected funds. Thus, the premise for this appeal – which the Government is not free to dispute – is that the Government failed to collect monies for the Tribes' mineral assets in breach of its fiduciary duties. The issue presented is whether the Government is also liable for the lost interest on those funds. The court of appeals correctly concluded that 25 U.S.C. § 612 and the general trust fund provisions impose liability in these circumstances.

Second, the Government argues that, in *Peoria Tribe*, the Government's obligation to sell land and its duty to pay interest on the sale proceeds both arose from the same source of law, *i.e.* the treaty, whereas here the

Government's duty to manage the Tribes' mineral resources and its duty to invest and pay interest on the proceeds from those resources involve different statutes and what the Government contends are two "legally distinct trusts:" (1) tribal land and other natural resources, and (2) tribal funds held in Treasury accounts.[13] This distinction is spurious. *Peoria Tribe* does not require that the Government's obligation to invest tribal funds arise from the same source of law as its duty to collect those funds in the first instance. To the contrary, it is fundamental "that all acts in pari materia are to be taken together, as if they were one law." *United States v. Freeman*, 44 U.S. (3 How.) 556, 564 (1845). Furthermore, 25 U.S.C. § 612 explicitly mandates the investment of "all revenues and receipts derived . . . *under any and all laws*." (emphasis added).

The issue here is the extent of the Government's liability to the Tribes for breach of fiduciary duty. To

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[13] The Government cites no authority for its dubious contention that its stewardship of tribal lands and natural resources is a legally distinct trust from its stewardship of tribal funds. In fact, Congress regards the United States' various fiduciary obligations to Indians as being parts of an integrated whole. *See* 25 U.S.C. § 162a(d)(8), (defining the proper discharge of the Government's trust responsibilities for Indian trust funds to include "appropriately managing the natural resources located within the boundaries of Indian reservations and trust lands"). Even if they are separate trusts, they are closely interrelated. The Government itself defines Indian trust funds as "money *derived from the sale or use of trust lands, restricted fee lands, or trust resources* or other money that the Secretary must accept into trust." 25 C.F.R. § 115.002 (emphasis added). Likewise, the very purpose of many statutes and regulations governing the management of Indian resources is to require the Government to manage them "*so as to generate proceeds for the Indians*." *Mitchell II*, 463 U.S. at 226-27 (emphasis added).

resolve that issue, all sources of law establishing the Government's various duties to the Tribes must be considered together. Congress, in delineating the Government's fiduciary responsibilities towards an Indian tribe, is free to impose an obligation to invest tribal funds in separate legislation from other provisions obliging the Government to manage tribal lands and resources so as to generate income for the tribe.

Finally, the Government argues that *Peoria Tribe* is inapposite because it involved a treaty that must be construed in favor of the Indians rather than, as here, a statutory obligation. This is a distinction without a difference in deciding the Government's liability. An obligation is no less money-mandating on the Government because it is self-imposed through statute or regulation rather than being bargained for as part of a treaty.[14] Indeed, *Mitchell II* and virtually all of its progeny have involved duties imposed by statute or regulation rather than by treaty. Nor is there a difference in the interpretation of treaties and statutes where Indians are concerned – both are construed liberally in their favor. *Chickasaw Nation v. United States*, 534 U.S. 84, 99 (2001) (O'Connor, J., dissenting). Moreover, the statutory language at issue here is even stronger and more specific than the treaty language in *Peoria Tribe* in terms of spelling out the Government's duty to invest proceeds received for tribal resources. 25 U.S.C. § 612 provides that all future revenues and receipts derived from the

[14] The Government has long taken the position, based on the sixth article of the Constitution, that "treaties as well as statutes are the law of the land" and "stand upon the same level, and [are] of equal validity." 13 Op. Atty. Gen. 354 (1870).

Wind River Reservation shall be deposited in trust accounts that "shall accrue" interest at a rate of 4% per annum. There is no need for resort to a canon of construction in order to determine the meaning of this statutory command.

CONCLUSION

The Tribes respectfully request that the Government's petition for certiorari in this case be denied.

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In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

SHOSHONE INDIAN TRIBE OF THE WIND RIVER RESERVATION AND THE ARAPHO INDIAN TRIBE OF THE WIND RIVER RESERVATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

The Federal Circuit fundamentally erred in holding that the relevant appropriations Acts revive claims that were time-barred before the first of the Acts was passed, even though nothing in the Acts so provides. Pet. 12-19. This Court has recognized that the revival of such moribund claims raises substantial retroactivity concerns, and other courts of appeals, unlike the Federal Circuit in this case, have accordingly insisted upon a clear statement or affirmative expression of intent by Congress before a statute will be construed to have that effect. Pet. 13-14, 17. The Tribes make no effort to reconcile the decision below with those precedents.

The court of appeals further erred by abrogating the statute of limitations not only for claims based on the government's alleged violation of statutes governing its handling of "trust funds" held in the Treasury—the subject of the appropriations Acts—but also to distinct claims based on the alleged violation of duties under *other* statutes to collect revenues from leases or other transactions involving land and natural resources. Pet. 20-23. The court of appeals then

compounded that error by holding that the Tribes are entitled to interest on those claims from the day of the violation, even though there is no Act of Congress providing for the payment of prejudgment interest on such claims, as required by 28 U.S.C. 2516 and this Court's cases.

Those seriously flawed rulings by the Federal Circuit will substantially increase the volume and complexity of Indian trust litigation, as well as the potential monetary exposure of the United States in suits alleging breach of the government's trust obligations. Those disruptive effects are particularly great when the court of appeals' holdings are considered together, since the availability of prejudgment interest under that decision creates a particular incentive for plaintiffs to pursue claims that accrued (and expired) in the distant past.

The Tribes make no meaningful effort to dispute the practical significance of the court of appeals' decision, nor do they contend that the case is insufficiently important to warrant this Court's review. Indeed, the Tribes themselves have filed a certiorari petition (No. 04-731) seeking review of the Federal Circuit's interpretation of the appropriations Acts as applied to claims concerning land and natural resources. Significantly, moreover, the Tribes appear to acknowledge (Br. in Opp. 6 n.6) that, under the court of appeals' decision, the effect of the appropriations Acts will often be to revive moribund claims. Their only response is that the government "can trigger commencement of the limitations period at any time by furnishing an accounting to the affected tribes or individuals." *Ibid.* That observation entirely misses the point. No matter how quickly the government completes the accountings, plaintiffs will be entitled under the Federal Circuit's decision to seek redress for alleged breaches of trust that occurred decades in the past—no matter how clearly a plaintiff was on notice of the alleged breach at an earlier time.

A. The Court Of Appeals' Expansive Construction Of The Appropriations Acts Warrants Review By This Court

1. Our certiorari petition explains (at 15-16) that the appropriations Act provisions, read as a whole, are best construed as preventing expiration of the applicable limitations period on any causes of action covered by the Acts that remained live when the first of the Acts was passed. The limitations period will then run on such a claim after an accounting is completed. The Tribes contend, however, that the appropriations Acts should be construed to have the far more sweeping effect of reviving time-barred claims as well. That contention is without merit.

The Tribes fail even to mention the decisions of this Court, cited in our petition (at 13, 17), that recognize the substantial retroactivity concerns raised by the revival of time-barred claims. See *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 950 (1997) ("[E]xtending a statute of limitations after the pre-existing period of limitations has expired impermissibly revives a moribund cause of action."); cf. *Stogner* v. *California*, 539 U.S. 607 (2003). They likewise fail even to mention the decisions of other courts of appeals, likewise discussed in our petition (at 13), holding that an Act of Congress will not be construed to revive time-barred claims, at least in the absence of a clear statement or affirmative manifestation of intent by Congress. See, *e.g.*, *Resolution Trust Corp.* v. *Seale*, 13 F.3d 850, 853 (5th Cir. 1994) ("clear expression" required). Indeed, invoking the presumption against retroactivity, this Court itself has adopted such a rule of construction in declining to interpret a new statute of limitations to revive time-barred claims. See *Fullerton-Krueger Lumber Co.* v. *Northern Pac. Ry.*, 266 U.S. 435, 437 (1925). The requirement of a clear statement is reinforced in this case by the firmly established rule that a statute of limitations is a condition on the waiver of the United States' sovereign immunity from suit and therefore

must be strictly construed in favor of the United States. See Pet. 14.

Insistence upon a clear statement before giving such retroactive effect to a statute assures that Congress itself has affirmatively considered the potential unfairness or other adverse effects of retroactive application and has "determined that it is an acceptable price to pay for the countervailing benefits." *INS* v. *St. Cyr*, 533 U.S. 289, 316 (2001). The appropriations Acts at issue in this case, however, do not contain any clear statement in their text reviving moribund claims, and there is nothing in those Acts or their background demonstrating that Congress affirmatively considered the question and decided to take that extraordinary step. Indeed, far from manifesting any intent (much less the requisite clear intent) to revive moribund claims, the phrase "shall not commence to run" is most naturally read to apply only prospectively, to claims that had not yet accrued (and for which the limitations period therefore had not yet "commenced") when the first of the Acts was passed. The phrase has no natural—and certainly no unambiguous—application to claims as to which the applicable limitations period had not only "commence[d] to run" but had long since expired. Nor is the Tribes' interpretation supported by Congress's far more modest purpose in enacting the appropriations Act provisions: to maintain the status quo by ensuring that the claims of Tribes and individual Indians do not expire during the pendency of the accounting process. See Pet. 23 n.12.

There is no basis for the Tribes' contention (Br. in Opp. 5) that the appropriations Acts are necessarily retroactive and therefore revive time-barred claims because the versions of the Acts beginning in 1993 expressly provide that the deferral of the limitations period applies to "any claim in litigation pending on the date of the enactment of this Act." That phrase merely serves to eliminate any doubt that a plaintiff who had already filed a timely suit would be able to

take full advantage of the tolling provision—*e.g.*, by dismissing its suit and then refiling after an accounting has been completed. In addition, as a result of that express inclusion of "pending cases," there is now also a reasonable basis for declining to give the phrase "shall not commence to run" what would otherwise be its most natural reading—as limiting the tolling provision to claims that had not yet accrued when the first of those Acts was passed (see p. 4, *supra*)—and for instead construing the appropriations Acts to defer the running of the statute of limitations even for claims that *had* already accrued (but were not time-barred) when the first of those acts was passed. See Pet. 16-17 n.7. Contrary to the Tribes' assertion (Br. in Opp. 5), such laws extending the limitations period for live claims do not trigger the presumption against retroactivity and resulting requirement of a clear statement.

By contrast, laws that revive time-barred claims plainly *are* disfavored in that stronger sense, and nothing in the phrase referring to "pending cases" suggests that the appropriations Acts were intended to have that extraordinary consequence. In any event, only a clear statement by Congress would suffice to give the Acts that effect, and there is nothing of the sort here.[1]

2. The certiorari petition explains (at 20-23) that the phrase "losses to * * * trust funds" in the annual appropriations Acts does not stop the running of the limitations period for claims based on the allegedly wrongful failure by the United States to collect money owed under the Tribes' mineral leases. The Tribes contend (Br. in Opp. 7-8) that the government's reading of that phrase fails to accord distinct

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[1] The Tribes' position, moreover, accords the 1993 addition of the reference to "pending cases" no operative significance. For if the Tribes were correct that the appropriations Acts had already categorically eliminated any statute of limitations issue for *all* claims until an accounting is performed, the Acts would *already* have encompassed pending cases, and far more.

meanings to the words "losses" and "mismanagement" as they pertain to Indian trust funds. That is incorrect. The word "losses" describes the effect upon the trust, while the word "mismanagement" focuses upon the government's actions as trustee. Undoubtedly there is substantial overlap between the two terms, in the sense that "mismanagement of" trust funds will often result in "losses to" the funds. The Tribes are incorrect, however, in contending that the government's reading of the appropriations Acts renders the terms synonymous.

As the Tribes acknowledge (Br. in Opp. 9), Congress was surely aware that the government is subject to statutory responsibilities with respect to Indian lands and natural resources that are entirely distinct from its statutory duties to manage funds in Indian trust accounts held in the Treasury. See Pet. 23-24. The existence of those separate statutory schemes strongly reinforces the significance of the statutory language that Congress employed in the appropriations Acts. Congress chose to defer the running of the statute of limitations, not for all claims that allege mismanagement of trust "assets" or "resources," but only for claims "concerning losses to or mismanagement of trust *funds*."[2] Congress's evident intent was to defer the limitations period only for claims that the government had improperly performed its duties as trustee for Indian *monetary* assets. That conclusion is confirmed by the express and limited

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[2] As the Tribes observe (Br. in Opp. 8), the applicable regulatory definition of the term "trust funds" includes "money derived from" lands or natural resources held in trust. 25 C.F.R. 115.002. Section 115.002 defines the term "trust assets" to mean "trust lands, natural resources, *trust funds*, or other assets held by the federal government in trust for Indian tribes and individual Indians" (emphasis added). By referring separately to "natural resources" and "trust funds," that definition makes clear that, while "trust funds" may include money actually derived from the sale or lease of Indian mineral resources, it does not include either the minerals themselves or money that allegedly should have been, but was not, in fact, derived from natural resources.

purpose of the appropriations Acts, which is only to defer the limitations period until there has been "an accounting of *such funds*"—*i.e.*, of the trust funds themselves, not of land and natural resources. Pet. 21-23.[3]

B. The Court Of Appeals' Holding That The Tribes Are Entitled To Prejudgment Interest Also Warrants Review

1. Respondents state (Br. in Opp. 12) that their "damages claim for lost interest is predicated upon the Government's statutory obligation to invest and earn interest on all revenues derived from the Tribes' natural resources." They rely on 25 U.S.C. 612, which provides that "all future revenues and receipts derived from the Wind River Reservation" shall be "credited to the principal trust fund accounts" established for the Tribes, on which "interest shall accrue * * * at the rate of 4 per centum per annum." They also rely (Br. in Opp. 13, 17) on Indian statutes of general applicability that provide for the payment of interest on funds that are "carried on the books" of the Treasury to the credit of Tribes and individual Indians (25 U.S.C. 161a, 161b) or funds that are "withdraw[n] from the United States Treasury" for deposit in banks (25 U.S.C. 162a). All of those

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[3] As the petition for certiorari explains (at 21), the American Indian Trust Fund Management Reform Act of 1994, Pub. L. No. 103-412, 108 Stat. 4239, refers only to an accounting of Indian *monetary* assets held in trust by the United States. The Tribes' description (Br. in Opp. 10-11) of the government's duties under the 1994 Act does not call that point into question or suggest that the government is required to account for funds that should have been received from Indian natural resources but were not in fact received. The certiorari petition also explains (at 22 n.11) that the district court in *Cobell* v. *Norton*, No. 96-cv-1285 (D.D.C.), enjoined the government to proceed in compliance with a broader view of the obligations imposed by the 1994 Act to account for trust funds, and that the injunction was subsequently vacated by the court of appeals. On February 23, 2005, after the petition for certiorari in this case was filed, the district court in *Cobell* reinstated the historical accounting portions of the prior injunction. The government has filed a notice of appeal from that order and has sought an emergency stay from the D.C. Circuit.

statutes thus concern funds that have already been received by the government and credited to accounts held for Indians in the Treasury. None provides for the payment of interest on money that has not been so received and deposited.

If the government had received payments on tribal mineral leases and deposited the money into a *non*-interest-bearing account in the Treasury, an award of the interest to which the Tribes were legally entitled would be an appropriate means of redressing the government's breach of its statutory obligations under Section 612 or the other statutes cited above. Such an award would not be "[i]nterest on a claim" within the meaning of 28 U.S.C. 2516(a), because the government's breach of its duty to pay interest on monies it deposited in the Treasury would itself be the claim on which relief was granted.

The Tribes identify no provision of law, however, that requires the government to pay interest on money that was *not* actually received from Indian mineral leases and deposited in the Treasury, whether because of governmental mismanagement or for any other reason. The Tribes instead attempt (Br. in Opp. 13-14) to avoid the firmly established rule under 28 U.S.C. 2516 and this Court's cases barring an award of prejudgment interest (see Pet. 24-25) by characterizing the award of interest in this case as an element of "damages" for the mismanagement of tribal minerals. As the Court explained in *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986), however, the "character or nature of 'interest' cannot be changed by calling it 'damages,' 'loss,' 'earned increment,' 'just compensation,' 'discount,' 'offset,' or 'penalty,' or any other term, because it is still interest and the no-interest rule applies to it." *Id.* at 321 (quoting *United States* v. *Mescalero Apache Tribe*, 518 F.2d 1309, 1322 (Ct. Cl. 1975), cert. denied, 425 U.S. 911 (1976)).

The gravamen of the Tribes' contention is that, "[b]y failing to reasonably manage the collection of lease payments, the Government deprived the Tribes of not only trust

principal, but also the interest that would have been generated on that principal had the Government not breached its fiduciary responsibilities." Pet. App. 23a-24a n.7. That rationale is indistinguishable from the asserted justification for *any* award of prejudgment interest—*i.e.*, to provide "complete compensation" by "ensur[ing] that the [plaintiff] is placed in as good a position as he would have been in had" no violation of law occurred. *General Motors Corp.* v. *Devex Corp.*, 461 U.S. 648, 655 (1983); see *West Virginia* v. *United States*, 479 U.S. 305, 310-311 (1987). Statutory and decisional law makes clear, however, that prejudgment interest is nonetheless unavailable in suits against the United States, absent a statute expressly providing for such an award. See Pet. 24-25; *Shaw*, 478 U.S. at 315 ("policy, no matter how compelling, is insufficient, standing alone, to waive immunity to interest").

2. The Tribes' reliance (Br. in Opp. 14-20) on *Peoria Tribe of Indians* v. *United States*, 390 U.S. 468 (1968), is misplaced. The Court in *Peoria Tribe* framed the relevant question as "whether the obligation of the United States to invest" the proceeds of tribal land sales in income-producing stocks "applies to proceeds which, by virtue of the United States' violation of the treaty [*i.e.*, its failure to sell the land at public auction], were never in fact received." *Id.* at 471. Relying in part on canons of construction that are distinctive to Indian treaties, see *id.* at 472-473, the Court construed the pertinent treaty to require the payment of interest, see *id.* at 471-473. As the Federal Circuit's predecessor court, the Court of Claims, explained—in the same *Mescalero Apache Tribe* case this Court quoted with approval in reaffirming the no-interest rule in *Library of Congress* (see p. 8, *supra*)—"*Peoria Tribe* * * * did not change the usual rule that *absent breach of a specific treaty obligation*, no interest, or its equivalent, can be allowed against the United States." 518 F.2d at 1322 (emphasis added). This case, unlike *Peoria Tribe*, involves no treaty obligation.

Moreover, the Tribes have not even identified any *statutory* provision that could plausibly be construed to require the government to pay interest on hypothetical lease proceeds that were never actually deposited in the Treasury. Indeed, in its en banc decision in the seminal *Mitchell II* Indian trust litigation, the Court of Claims held that 25 U.S.C. 161a, 161b, and 162a— invoked by resondents and the panel below in this case—do *not* furnish a basis for an award of interest on a claim for mismanagement of natural resources. *Mitchell* v. *United States*, 664 F.2d 265, 274-275 (Ct. Cl. 1981), aff'd on other grounds, 463 U.S. 206 (1983); see Pet. App. 30a-32a (Rader, J., dissenting in part). Thus, respondents' argument, like the Federal Circuit's decision in this case, is a sharp departure from established precedent barring the award of prejudgment interest.

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For the reasons stated above, and in the petition for a writ of certiorari, the petition should be granted.

PAUL D. CLEMENT
Acting Solicitor General

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